DOCUMENT RESUME

ED 380 256 RC 019 996

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| TITLE | Indian Self-Determination and Education Assistance Act. Oversight Hearing on the Implementation of the Indian Self-Determination Act, and Development of Regulations Following Passage of the 1988 Amendments to the Act before the Subcommittee on Native American Affairs of the Committee on Natural Resources. House of Representatives, One Hundred Third Congress, Second Session (July 29, 1994). |
| INSTITUTION | Congress of the U.S., Washington, DC. House Subcommittee on Native American Affairs. |
| REPORT NO | ISBN-0-16-046775-6 |
| PUB DATE | 95 |
| NOTE | 217p.; Serial No. 103-105. |
| AVAILABLE FROM | U.S. Government Printing Office, Superintendent of Documents, Congressional Sales Office, Washington, DC 20402. |
| PUB TYPE | Legal/Legislative/Regulatory Materials (090) |
| EDRS PRICE | MF01/PC09 Plus Postage. |
| DESCRIPTORS | *American Indian Education; *Bureaucracy; Elementary Secondary Education; *Federal Indian Relationship; Federal Legislation; Federal Programs; Health Programs; Hearings; *Program Administration; Public Agencies; *Self Determination; Tribally Controlled Education; *Tribes |
| IDENTIFIERS | Bureau of Indian Affairs; Congress 103rd; Indian Health Service; *Indian Self Determination Education Assistance Act |

ABSTRACT

The Indian Self-Determination and Education Assistance Act of 1975 aimed to maximize tribal participation in planning and administration of federal services and programs, and to reduce federal bureaucracy in those programs. Despite passage of the act, tribal attempts to assume operations of federal programs were hindered by increased federal bureaucracy and restrictive contracting regulations. The 1988 amendments to the act were intended to remove contracting barriers, and required the Bureau of Indian Affairs and the Indian Health Service to develop regulations with the participation of tribes by October 1989. Despite the preparation of two sets of negotiated tribal-federal draft regulations between 1988 and 1990, the agencies shut down further tribal consultation from mid-1990 to early 1994. In January 1994, the agencies published proposed regulations that bore little resemblance to prior negotiated drafts, and that actually complicated and raised further barriers to the contracting process. With mounting frustration, the tribes unanimously denounced the proposed regulations and called for legislation that would supplant the regulatory process. Both the House and Senate have introduced amendments to make the act's key provisions self-implementing and to establish a model contract. This document contains testimony and written comments on the situation from representatives of the Department of the Interior and the Department of Health and Human Services, tribal leaders, and lawyers representing tribes and tribal organizations. (SV)

RC

ED 380 256

# INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT

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## OVERSIGHT HEARING

BEFORE THE

SUBCOMMITTEE ON NATIVE AMERICAN AFFAIRS

OF THE

COMMITTEE ON
NATURAL RESOURCES
HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRD CONGRESS

SECOND SESSION

ON

THE IMPLEMENTATION OF THE INDIAN SELF-DETERMINATION ACT, AND DEVELOPMENT OF REGULATIONS FOLLOWING PASSAGE OF THE 1988 AMENDMENTS TO THE ACT

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JULY 29, 1994—WASHINGTON, DC

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**Serial No. 103–105**

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Printed for the use of the Committee on Natural Resources

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87-932cc ≈ WASHINGTON : 1995

For sale by the U.S. Government Printing Office
Superintendent of Documents, Congressional Sales Office, Washington, DC 20402
ISBN 0-16-046775-6

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# INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT

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FRIDAY, JULY 29, 1994

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON NATIVE AMERICAN AFFAIRS,
COMMITTEE ON NATURAL RESOURCES,
*Washington, DC.*

The subcommittee met, pursuant to call, at 9:59 a.m. in room 1324, Longworth House Office Building, Hon. Bill Richardson [chairman of the subcommittee] presiding.

## STATEMENT OF HON. BILL RICHARDSON, A U.S. REPRESENTATIVE FROM NEW MEXICO, AND CHAIRMAN, SUBCOMMITTEE ON NATIVE AMERICAN AFFAIRS

Mr. RICHARDSON. The Subcommittee on Native American Affairs will come to order. This morning we will be taking testimony on the implementation of the Indian Self-Determination Act, and also, the development of regulations following passage of the 1988 amendments to the Self-determination Act.

The Indian Self-determination and Education Assistance Act was signed into law in 1975 in order to maximize tribal participation in the planning and administration of practical services and programs, as well as to reduce the Federal bureaucracy within those programs.

Despite passage of the act, tribal attempts to assume the operation of Federal programs have been hindered by an increased Federal operation of Federal programs, and they have been hindered by an increased Federal bureaucracy as well as by restrictive and unnecessary contracting regulations.

The 1988 amendments to the Indian Self-determination Act were intended to remove these barriers to contracting. The 1988 amendments required the BIA and the Indian Health Service to develop regulations with the participation of tribes by October of 1989.

Six years later, the agencies have yet to promulgate regulations. Despite the preparation of two sets of negotiated tribal Federal draft regulations between 1988 and 1990, the agencies shut down further tribal consultation from mid-1990 until earlier this year.

In January of this year the agencies finally published a proposed set of regulations which bore little, if any, resemblance to the prior negotiated drafts. The proposed regulations are several hundred pages in length and actually complicate, rather than simplify, the contracting process. In other words, the new regulations would accomplish exactly the opposite of what the 1988 amendments intended to achieve.

The regulatory process has cost the tribes hundreds of thousands of dollars, and has led to great confusion within Indian country and along the Federal agencies. Despite the Agency's recent pledge to extend the comment period and renegotiate the proposed regulations, tribes remain suspicious because not only have the tribes already been through two previous negotiations, but the issues now in dispute are the very same issues that were in dispute six years ago.

Finally, I am sure that all of the witnesses are familiar with S. 2036, legislation introduced by our good friend, Senator John McCain, to eliminate or in some instances minimize the promulgation of further regulations under Indian Self-determination Act, and to establish a model Self-determination Act contract. On Wednesday I introduced similar legislation to Senator McCain's, H.R. 4842. To the extent that witnesses are prepared to comment on these legislative proposals, the subcommittee welcomes such testimony.

We must have fewer regulations. Last September, the President signed an Executive Order calling for each department and agency to eliminate at least 50 percent of its internal management regulations within three years. I believe that the regulations governing the Indian Self-determination Act contracting process are no exception to this rule.

At this time I would remind all witnesses to summarize as much as possible. Their full statements will be made part of the record. The record will be kept open for two weeks. Right now I would like to submit the background for the record.

[The information follows:]

## Background on the Indian Self-Determination and Education Assistance Act

The Indian Self-Determination and Education Assistance Act was signed into law in 1975 in order to maximize tribal participation in the planning and administration of Federal services and programs, as well as to reduce the Federal bureaucracy within those Indian programs. Despite passage of the Act, tribal attempts to assume the operation of Federal programs were hindered by an increased Federal bureaucracy as well as restrictive and unnecessary contracting regulations. The 1988 Amendments to the Indian Self-Determination Act were intended to remove these barriers to contracting. The 1988 Amendments required the Bureau of Indian Affairs and the Indian Health Service to develop regulations with the participation of Indian tribes by October of 1989.

Six years after passage of the 1988 Amendments, the agencies have yet to promulgate regulations. Despite the preparation of negotiated tribal-Federal draft regulations, the agencies rejected the negotiated regulations. In January 1994, when the agencies finally published their proposed set of regulations, the proposal bore little resemblance to the negotiated draft but rather contained nearly all of the agencies' positions from their earlier drafts. The comments period on the proposed regulations closes in August 20. Recently, the agencies and the tribes have agreed to re-negotiate the content of the proposed regulations under the Federal Advisory Committee Act in October of this year.

The regulatory process has cost the tribes hundreds of thousands of dollars, and has led to great confusion within Indian Country and among the Federal agencies. Rather than simplifying the contracting process, the proposed regulations would actually complicate the process and raise even greater barriers to Self-Determination Act contracting by tribes.

A mounting sense of frustration on the part of Indian Country has led to the unanimous denouncement of the proposed regulations and a call for legislation that would supplant the regulatory process. Recently, the House and the Senate have introduced similar measures, H.R. 4842, the Indian Self-Determination Act Amendments of 1994, and S. 2036, the Indian Self-Determination Contract Reform Act of 1994, respectively, which would amend the Indian Self-Determination and Education Assistance Act by making key provisions of the Act self-implementing and by establishing a model contract. The model contract would govern the terms under which Indian tribes and tribal organizations could assume the operation and management of Federal programs and functions benefiting Indians that are operated within the Department of the Interior and the Department of Health and Human Services, including programs and functions of the Bureau of Indian Affairs and the Indian Health Service. H.R. 4842 would greatly simplify the contracting process, as the 1988 Amendments were originally intended to do, and would reduce the bureaucracy that is so pervasive in Federal Indian programs.

The purpose of this hearing is to solicit the views of Indian Country and the Administration on the implementation of the Indian Self-Determination and Education Assistance Act and the 1988 Amendments. In addition, the Subcommittee on Native American Affairs is seeking the views of Indian Country and the Administration on the extent, development and support of Indian Self-Determination Act contracting within all agencies in the Department of the Interior. Finally, although the Subcommittee is not requesting formal views on H.R. 4842, the Subcommittee welcomes any comments which Indian tribes and the Administration choose to submit.

Mr. RICHARDSON. Needless to say, we are delighted to have as our first witness the Vice-Chairman of the Senate Indian Affairs Committee, the Honorable John McCain, who has enormous leadership on a variety of Indian issues. The Senator was testifying this week also on other pieces of legislation. Once again, we welcome you, Senator. Please proceed. And the five minutes does not extend to you.

## STATEMENT OF HON. JOHN McCAIN, A U.S. SENATOR FROM ARIZONA

Senator MCCAIN. Mr. Chairman, I will try to take about two minutese, because as usual we are in complete agreement, and frankly your opening statement says just about everything that I want to say. Except, Mr. Chairman, I want to thank you and Congressman Thomas for your incredible work on this subcommittee.

There was some question for years, when I was a Member of this committee, as to whether there should be a subcommittee on this issue. I think you and Congressman Thomas have graphically demonstrated that this subcommittee was needed long ago, and I am deeply appreciative of your leadership and the tremendous cooperation that you and I and Congressman Thomas have had with Chairman Inouye on a broad spectrum of issues.

Mr. Chairman, as you said, six years ago the Congress passed this legislation to reform the 638 contracting process, called for the BIA and IHS to issue final joint regulations by October of 1989. To date, final regulations still have not been issued.

Now, the BIA and the IHS want to begin a whole new round of negotiations. I find the conduct of the BIA and the IHS under this administration and under previous administrations to be outrageous. I was just as critical of the last administration for their handling of this matter, and I note that this administration, which has said it wants to reduce burdensome regulations, reinvent government, listen more carefully to Indian tribes, has failed to act responsibly on this issue, just as previous administrations did.

I believe we have the opportunity to put an end to the bureaucratic games this year, and our two pieces of legislation are similar. We can bring finality to it. And as you know, both your legislation and our legislation proscribe the terms and conditions for any self-determination contract and prohibit the Secretary from promulgating any regulations for the act. No modifications are permitted without written agreement of the Secretary and the tribe.

Mr. Chairman, the only thing that I would like to add is that this year there was a national meeting of Indian tribes concerning this issue and the tribes overwhelmingly endorsed what is said in your legislation and in ours.

Again, if we are listening to the Indians, I would suggest that the best thing that we could do is to pass your legislation before we go out of session this year.

Thank you very much, Mr. Chairman. I appreciate the opportunity again to be with you.

Mr. RICHARDSON. Thank you, Senator.

[The statement of Senator McCain may be found at end of hearing.]

Mr. RICHARDSON. You have been very instrumental, throughout your career, especially with the BIA and making sure that the Federal Government saves money.

Can you just tell us how you think the legislation that you initiated on the Self-determination Act, how we actually are saving money? And you also discuss the performance of the bureaucracies, the IHS, the BIA. Have you over the years seen any improvement in them trimming this bureaucracy?

Senator MCCAIN. You know, Mr. Chairman, one of the great disappointments to me has been that we have not been able to reduce the size of the bureaucracy.

When we pass legislation such as self-governance, where you know a number of tribes have been able to engage in self-governance, the result has still been no decrease in the bureaucracy when the whole object—well, a secondary object was to reduce the size of the bureaucracy.

As you know, Mr. Chairman, the 1975 Indian Self-Determination, Education and Assistance Act provided the tribes with the authority to contract with the Federal Government to operate programs serving their tribal members, and this policy over the years has proved to be very successful in terms of promoting tribal operation of Federal programs and services that are administered by the BIA and IHS. It has been successful.

The policy had its origins back in the Nixon administration, as you know. And unfortunately, as we have moved forward, there has been greater and greater encroachment upon that philosophy. Today approximately $531 million of the funds appropriated to the BIA are administered by tribal governments under self-determination contracts, and there are over 400 contracts between Indian tribes and the IHS involving about $497 million annually.

And when we considered the 1988 amendments, we noted that the act had failed to meet its goal of reducing the Federal bureaucracy and ending the Federal domination of Indian programs. In fact, Mr. Chairman, there have been no reduction in the Federal bureaucracy. Instead, the act had spawned an increase in Federal officials who were employed to monitor self-determination contracts.

As so many layers of the bureaucracy and rules have been imposed that the contract approval process required an average of six months, rather than 60 days as mandated by the act. So I regret to tell you, Mr. Chairman, that instead of moving forward we seem to be moving backwards, as the imposition of more regulations has taken place.

And now, tragically, both IHS and BIA are going to appear before you and say that they want to renegotiate regulations again. And every Indian tribal leader that I have talked to has said they want less regulations, they want less bureaucracy, they want to determine their own futures, and they want to govern themselves.

So, Mr. Chairman, I hate to come before you with a bleak picture, but maybe it can give us the proper impetus to go ahead and pass this important legislation.

Mr. RICHARDSON. Well, I want to thank the Senator. I know he is very busy. We once again appreciate all the work he has done with us, and we wish him well in the days ahead.

Thank you, Senator.

Senator MCCAIN. Thank you, Mr. Chairman.

## STATEMENTS OF BONNIE COHEN, ASSISTANT SECRETARY, POLICY, MANAGEMENT AND BUDGET, U.S. DEPARTMENT OF THE INTERIOR, ACCOMPANIED BY FAITH ROESSEL, DEPUTY ASSISTANT SECRETARY FOR INDIAN AFFAIRS AND MOLLY POAG, SPECIAL ASSISTANT TO THE SECRETARY AND DIRECTOR, OFFICE OF REGULATORY AFFAIRS; AND MICHEL LINCOLN, DEPUTY DIRECTOR, INDIAN HEALTH SERVICE, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, ACCOMPANIED BY ATHENA SCHOENING, DEPUTY ASSOCIATE DIRECTOR, OFFICE OF TRIBAL AFFAIRS, INDIAN HEALTH SERVICE AND RICHARD McCLOSKEY, DIRECTOR, DIVISION OF LEGISLATION AND REGULATIONS, OFFICE OF PLANNING, EVALUATION & LEGISLATION, INDIAN HEALTH SERVICE

Mr. RICHARDSON. We will now move on to our next panel, the Executive Branch witnesses, the Honorable Bonnie Cohen, Assistant Secretary for Policy, Management and Budget at the Department of Interior. Secretary Cohen will be accompanied by Faith Roessel, Deputy Assistant Secretary for Indian Affairs, Department of the Interior; Ms. Molly Poag, Special Assistant to the Secretary, and Director of the Office of Regulatory Affairs of the Department of the Interior.

And Mr. Michel Lincoln, Deputy Director, Indian Health Service, Department of Health and Human Services, Rockville, Maryland, accompanied by Athena Schoening, Deputy Associate Director, Office of Tribal Affairs, Rockville, MD, Mr. Richard McCloskey, Director, Division of Legislation and Regulations, Office of Planning, Evaluation and Legislation.

Mr. Lincoln, is Michael Trujillo confirmed yet?

Mr. LINCOLN. Congressman Richardson, yes, he is. He is——

Mr. RICHARDSON. We love to see you here, but we have—for some reason he has never appeared before this committee. And is he in Washington or is he out of town?

Mr. LINCOLN. He is out of town. The Assistant Secretary for Health, Dr. Philip Lee, had specifically requested that Dr. Trujillo participate in a strategic planning meeting with himself and other Public Health Service agency heads.

Mr. RICHARDSON. Well, we have invited him several times to appear. I don't think we have ever seen him. But we are delighted to see you. Secretary Cohen, please proceed.

## STATEMENT OF BONNIE COHEN

Ms. COHEN. Thank you, Congressman Richardson. I am pleased to be here to discuss the Department's efforts to implement the 1988 amendments to the Indian Self-Determination and Education Assistance Act.

As you indicated, I am accompanied by Faith Roessel and Molly Poag. At the outset, I want to assure you and the tribes that we are aware of the frustrations experienced regarding implementation of the act, and we are working hard to remedy these problems.

In the past 18 months, since we have taken office, we have made substantial progress. For example, when this administration took office, the proposed regulations, as Senator McCain indicated, had missed the statutory publication date by roughly four years. Publication quickly became a priority for Secretary Babbitt, and the proposed rule was published within a year.

Pursuant to tribal request, we are developing a process to reach consensus with the tribes on the final rule, and we anticipate publication by August, 1995, the date requested by the tribes. This administration recognizes our government-to-government relationship with the tribes, and is anxious to work with them to continue implementing this important legislation.

We appreciate the opportunity to come before you and to describe our efforts. We believe we are on the right track toward resolving many of the tribes' outstanding concerns, and that the current process should continue. We therefore urge that the Congress defer any legislation until we publish the final regulations. I would like it turn the discussion over to Faith Roessel, who will talk about the act and the contracting of BIA programs.

Ms. ROESSEL. Thank you, Bonnie. Mr. Chairman, it is indeed a pleasure to be here today. I would like to expand upon the written testimony that will be submitted from the Department and focus particularly on the Bureau of Indian Affairs.

The BIA has been very successful in contracting out its programs to tribes. In fiscal year 1993, BIA's total obligation for 638 contracts, including self-governance compacts, was roughly $700 million, or nearly one-third of BIA's total obligations.

As far as the area offices that award the highest number of 638 awards, Portland leads the areas with 1,933; Phoenix area is next with 1,615 awards; and Eastern, with 650 awards, nearly 90 percent of its current operations.

Under 638, tribes are able to administer at least a portion of virtually every existing BIA program, including human services, education, public safety and justice, community development, resource management, trust services, and general administration. As of the third quarter of fiscal year 1994, BIA has obligated $518 million to self-determination contracts, grants, and compacts.

Mr. Chairman, as you know, this administration is taking its charge very seriously to make government work. In this spirit, the Bureau of Indian Affairs has initiated a pilot project for administering nonprocurement contracts agreements. Under this project, eight BIA agencies are delegated authority to approve, negotiate, and award nonprocurement agreements that do not involve construction projects.

This means that a noncontracting officer makes awards at the agency level. This moves the decisionmaking authority to the lowest possible level within the Bureau. It reflects a true government-to-government relationship with tribes, while promoting partnerships.

We want to test and identify ways to develop a more effective and responsible rewarding process for 638 contracts. In the past year we have evaluated the agencies under the pilot project and feel that it has been very successful. The participating tribes are pleased with the shortened response time in making contract decisions and in processing contract approvals and awards.

If I may just continue in summary, Mr. Chairman.

Mr. RICHARDSON. Please do.

Ms. ROESSEL. Estimated time saved in some cases has literally been weeks. There are recommendations to expand our project under consideration by the Bureau and the Department.

If approved, our pilot project would be expanded to the second tier of BIA agencies totaling about 13 agencies. The Bureau is continuing to take the lead in promulgating the final regulations.

Assistant Secretary Deer is personally committed to developing a workable final rule in a timely manner. The final rule as developed with tribal input should bring clarity to the regulations, thus making it easier for tribes and nonBIA bureaus to resolve issues.

We believe that tribal recommendations must be given full consideration and we will work with tribal representatives to incorporate their recommendations whenever possible. I would like to now turn it back over to Bonnie.

Thank you.

Ms. COHEN. Thank you, Faith. We know that the Indian tribes are concerned not only about the delegation of BIA programs, but the delegation of nonBIA programs. And I would like to just tell you what we have been doing in that area.

The Bureau of Reclamation currently has the greatest portion of the nonBIA programs administered under 638 contracts. Among other things, tribes currently are administering planning operations, environmental studies, and the construction, operation, and maintenance of water systems and water-related projects.

We are anticipating that BIA will be increasing their 638 contracting opportunities. The Bureau of Reclamation will be increasing those opportunities, and it is offering training to its employees in 638 contracting procedures. The BLM has also entered into 638 contracts.

BLM is estimating over $5 million worth of programs in 638 contracts for fiscal year 1994, a substantial increase over the roughly 200,000 contracted in 1992. Many other nonBIA programs, though currently not contracted under 638, are administered through the cooperative arrangements such as a Memorandum of Understanding or agreement. For example, the Chehalis and Quinhalt tribes are conducting fishery restoration activities funded by the Fish and Wildlife Service under the Chehalis River Fisheries Program, and the Hoopa Valley, Karuk, and Yurok tribes are conducting similar activities in the Klamath River basin.

In Alaska, the Chief's conference and the Association of Village Council Presidents are collecting data that is used in Fish and Wildlife Service subsistence harvest management activities. The Blackfeet tribe in Montana has an assistance agreement with BLM for inspection and enforcement of Indian oil and gas operations, and many other BLM programs are also administered through cooperative agreements with the tribes.

Despite these efforts, the Department recognizes that more can and should be done. As a result, the Department has established an internal review process to identify nonBIA programs such as programs currently administered under cooperative agreements that may be subject to 638 contracting.

This review which is headed by the Department's Chief of Staff is ongoing and is increasing the Department's understanding of programs that directly benefit American Indians. This increased understanding will enable Bureau directors and office heads to actively promote these programs for contracting by tribes.

Now, I would like to turn it over to Molly Poag to talk about the status of regulations. Molly.

Ms. POAG. Thank you. Mr. Chairman, my role is to discuss the process, where we are in the development of the 638 regulations, why did it take so long to get to this point, and where do we go from here.

In other words, when are we going to have a final rule on the books? Let me begin by explaining the dilemma that this administration faced when we first came on board. We quickly learned of this rule, of course, and were stunned to hear that it was already four years behind the statutory deadline for publication.

We also quickly uncovered, however, an issue of considerable concern, the fact that there had been this lack of tribal input. This was of concern for two reasons. First, the 1988 amendments required tribal participation in the drafting process, and also this was a start of a new and historic administration and we wanted to get off on a positive footing with tribes.

Therefore, we were understandably hesitant to go out with a draft that we knew did not reflect tribal input. I think you know the history, Mr. Chairman. In short, there was tribal input up until September of 1990, but at that point, the two Federal agencies, HHS and DOI, took the draft reflecting tribal input and went behind closed doors and played with it for two years and came up with a very different draft, as you acknowledged, Mr. Chairman, in your opening remarks.

So it was this revised rule that was in front of us when we came on board in January of 1993. Our dilemma was whether to go out with that rule, knowing that tribes would be unhappy with many of its provisions and knowing they were unhappy with the process, or to take time to consult with tribes, further delaying the publication of even a proposed rule.

A further complicating factor was the fact that we didn't have a confirmed Assistant Secretary on board in the early days. Ada Deer was sworn in July 16th, 1993, and I can assure you that she took an immediate and direct interest in this rule. She consulted with tribal leaders, and asked their recommendation on how we addressed this dilemma. She came back to us with a recommendation based on those consultations that we go out with the rule as is, but that we make clear the fact that we were going to actively seek tribal input.

And we took that recommendation, published the rule. We revised the preamble to flag our concern about the lack of tribal input and to affirm our commitment to actively seek out and fully consider tribal comments during the public comment period. The rule was published on January 20th. We had originally 180—excuse me, 120-day comment period.

During that timeframe, we held three regional meetings with tribes and one national meeting with tribes specifically to solicit their input. Those were very well attended both by tribes and by departmental officials. They were also very productive. The tribes came to the table with very thoughtful comments.

At the last meeting, the national meeting, there was a caucus of the tribal leaders and they came back to us with three requests. First, they asked that we extend the comment period for another 90 days. Second, they asked that the tribes be included in the drafting process following the close of the comment period. And third, they asked that we complete the whole process by August 31st, 1995.

We agreed to all three requests. We extended the comment period to August 20th, which gives tribes a full seven months to comment from the time it was published. We worked out a way to involve tribes in the process. Specifically, we have a charter under the Federal Advisory Committee Act, and we are planning a minimum of three public meetings over the next year where we hope to receive consensus on this rulemaking involving tribes as we need to do.

And third, I know this is of particular interest to you, we agreed to the timeframe. We think August 31st, 1995, is a workable timeframe, that that gives us time to have the necessary consultations with tribes. The tribes think it is doable. We think it is doable. I can tell you that this regulation is one of the Secretary's top regulatory priorities, and we are going to do everything in our power to meet that deadline.

And the last thing I want to stress is simply that the process that we have established from this point forward fulfills the 1988 amendments' mandate to include tribes in the actual drafting process, and is on the path that I think we need to be on. I think it is the appropriate path, and I hope we are allowed to continue along that path.

And, Bonnie, I turn it back over to you.

[The statement of Bonnie Cohen may be found at end of hearing.]

## STATEMENT OF MICHEL LINCOLN

Mr. RICHARDSON. Let's—I want to ask you some questions, so let's move on to Mr. Lincoln.

Mr. LINCOLN. Mr. Chairman, thank you for allowing us to come to this hearing. I am accompanied today by Mr. Richard McCloskey, the Director of the Division of Legislation and Regulations.

We do share your concerns about the need for a simple straightforward regulation. We also share the concerns expressed by the Congress with respect to the timeframe that has been very thoroughly discussed by the Department of Interior.

Our testimony is submitted for the record. Perhaps I could just add two general statements and then be available for questions, Mr. Chairman. One of the statements is that as we move through the regulation development process, we too, as is the Department of Interior, are committed to living with the timeframes that have been identified in Albuquerque, New Mexico, at the national meeting, and in terms of extending the comment period also entering into a negotiation period starting in October of this fiscal year.

And so we would anticipate indeed that we would be in negotiations, we would be developing the final language and recommendations to both of our secretaries, and that this process would move very quickly through the first quarter of this upcoming fiscal year.

The last statement, Mr. Chairman, is that I personally have not had the opportunity to review the proposed legislation in front of the committee, and we certainly will be commenting back to the committee relative to these issues in those areas that we are very much in support and those issues that we would like to have a further opportunity to discuss with the committee.

Thank you, Mr. Chairman.

Mr. RICHARDSON. Thank you.

[The statement of Michel Lincoln may be found at end of hearing.]

Mr. RICHARDSON. Let me just say something to Assistant Secretary Cohen and Molly Poag and Faith Roessel and all of you. We have a little bit of a problem here. What I sense that you are telling me is you don't want us to pass this legislation until August of 1995? Is that right? Is that—is that what you are asking us to do?

Ms. COHEN. Well, Faith can speak to our specific positions on the legislation, but we feel that while there has been an unacceptable delay in the publishing of the regulations, we have draft regulations out. We have a process in place. And by permitting that process to go forward, we feel we will have satisfactory regulations really in the most efficient and effective way.

Mr. RICHARDSON. Well, if I understand correctly, you are talking about holding some meetings in January, six months of negotiations, the Secretary then considers the recommendations, then there is departmental and OMB clearance, final regs, possibly two years away, this is the estimate of my staff.

Let me just tell you what my thoughts are. In 1988 and 1990, this is before any of you came in, the tribes negotiated rulemaking with the Department of Interior, and they made agreements. But then the Department ignored this rulemaking. Now, I think you are all very well intended. And Ms. Franklin, you have been in, what, about a year?

Ms. Cohen?

Ms. COHEN. Year and a half.

Mr. RICHARDSON. And Ms. Poag, a year?

Ms. POAG. Yes, a year and a half.

Mr. RICHARDSON. And I respect that, and I know you are being very sincere. But my sense is, knowing the BIA the way I have over the last 11 years, they don't want to change. That is the problem.

The BIA has bureaucrats that don't want to change anything. And I think if we keep using the excuse that we have to have tribal input—we do, we get tribal input, and then the agencies ignore this input. That is the nature of the beast.

So we are back again with series of meetings and the bureaucracy is back. Basically what you are saying is you want new negotiations. And while I feel that you are sincere in wanting to achieve the President's goal, his Executive Order 12861, each agency eliminate 50 percent of its internal regulations, and Ms. Poag you have a very good reputation, that while I think that you are all aggressive and positive, your bureaucracy is creating a situation where you are becoming a victim to this endless process and they are going to say you have to consult with the tribes.

I know the BIA will say we have to have tribal input. Well, let's consult with every tribe in the world. And that is an endless process and they use that excuse to basically not do anything. And they do that with self-governance, they do that with Indian Health Service, they do that with self-determination. What else do they do it with? Everything.

You know, so—so I—I want to wish you well, I want to give you the tools. I think if I pass this bill, we pass McCain's bill and our bill, I think it will strengthen you. And I see you as three knights, at least the three women here, Lincoln also, but give you the tools to achieve this goal. Don't you see, don't you see what they are doing? Don't get drawn into this huge series of meetings and negotiations and you got to wait for this, you got to wait for that.

Ms. Cohen, you are the—you are the Assistant Secretary. You can take some shots back at me. I am not taking shots at you, but I worry about what you just told me.

Ms. COHEN. I don't think you are taking shots at me or my associates. I think, though, this is an important priority for Secretary Babbitt. He, the Chief of Staff, has taken the leadership role in this. We are committed to getting it done on the time schedule that we have laid out.

In areas that Secretary Babbitt has made a priority, he has seen that things get done. We are committed to getting this done. Now, we know the hurdles that we face. We have taken on a number of issues like this, but we feel that it is possible that we have regulations that the tribes can respond to in a meaningful way. We can sit down in a dialog, and we can get this done by August 1995.

I don't know if Molly wants to add something.

Ms. POAG. I would like to add one clarification, Mr. Chairman.

The process that we have established with being the charter of the Federal Advisory Committee Act, envisions having 48 representatives from the tribes. That is what the tribal caucus told us they wanted at the last national meeting.

So the tribes will choose the 48 representatives from the 12 areas, and the departments will choose their own representatives. And that is the process by which we will come to the final regulations. We have no intention, and I do not believe—I will say we will not take the draft that comes out of that process and go behind closed doors again, as was done in the prior administration, and revise it.

We are going to be working hand in hand with the tribes in the government-to-government relationship and through that process we are going to come to closure. No more the behind-closed-doors dealings.

Ms. ROESSEL. If I may add, Mr. Chairman, also, I think you know Ada Deer, and she certainly did not come to this administration to perpetuate a legacy that we have known in Indian country has been one dominated by lack of consultation or overuse of consultation for excuse purposes.

But I do need to remind the Chairman that this administration has made it very clear to its agencies and to its departments under the executive memoranda that was signed on April 29th when the President met with over 300 tribes at the White House, that very specifically we are required to consult when there are decisions affecting the tribes.

And the first hurdle we were faced with obviously was how do we do that in face of FACA, you know, the Federal Advisory Committee Act. As Molly has explained, although it seems unwieldy and burdensome, we have to go through that process in order to get I think the full advantage of tribal participation and involvement.

But I just want to assure the Chairman that I will take back your words to Ms. Deer. She is very concerned about the image of the BIA. She wants a new way of doing business, and I think she would be in full agreement with your statement.

Mr. RICHARDSON. I believe Secretary Babbitt—is this Collier that is involved? I mean he's very good, I have worked with him. You give me encouragement. You are good, young, new faces.

But can't you see what the bureaucracy is trying to do to you? They are trying to get you in this—they did this to the Bush people. They did this to the Reagan people. And they put you through this whole bureaucratic process, and then they say you got to bring the tribes in, and then they tell you, now talk to this tribe X, Y, and Z. And don't think there aren't some tribes that are in very tight with the BIA and they have this self-perpetuating process.

You know, we have—we have a BIA reorganization effort. You know what they are doing? They have asked us for another year to keep talking. It happens all the time. And what I am just saying to you is we have to get rid of some of this red tape.

And it just seems that we are engaging in more and trying to get rid of this red tape. And I think it is incumbent upon you to just set some deadlines. And I think August 1995 is too late. I am going to move this—I may move this bill soon.

The gentleman from American Samoa.

Mr. FALEOMAVAEGA. Will the Chairman yield? I recall, Mr. Chairman, that throughout the whole four years of the previous administration there was discussion and supposedly movement in the reorganization of the BIA, and to this day I have yet to see a report of that reorganization effort. And this is four years ago.

And I would like to second my absolute support for your consideration of this, Mr. Chairman, that August 1995 is absolutely too late. After having this bill passed since 1988, we are still talking about these regulations. And I am just—there is no excuse as far as I am concerned.

And I think—I think in the fact this is not Secretary Babbitt now on the line, the fact that the President of the United States, taking some 300 tribes to the White House, making such a big affair of this whole thing, dealing with Native American needs, and we are right back to square one, we are talking about the bureaucracy again, and not taking any real serious effort to see that these things are not going to be on a continual basis for another 100 years, still no changes, no substantive changes taking place.

And so I for one just cannot see any justification why these regulations have to wait until August of 1995, just as we waited four years, the previous administration, for the reorganization of BIA, and still no results.

Ms. COHEN. Mr. Chairman, Congressman, the August 1995 date was developed in consultation with the tribes. But we understand your frustration. We share the frustration.

We can go back to the tribes and we could work against an earlier timeframe in consultation with them. We understand the urgency and the feeling of urgency that people have. It has been much too long. We think we can do it within the next year.

Mr. RICHARDSON. Well, let me—I just want to ask one question for Mr. Lincoln. Could you provide us with an estimated cost to the Indian Health Service on the failure when you don't promulgate regulations, the failure, the cost in doing that?

Mr. LINCOLN. Mr. Chairman——

Mr. RICHARDSON. In other words, the estimated cost to the IHS caused by the failure to complete promulgation of regulations in a timely fashion.

Mr. LINCOLN. Mr. Chairman, we will provide that for the record. If we could work with your staff to tease out the more detailed questions associated with that question, we would be glad to provide that for the record.

[The information may be found at end of hearing in a letter dated October 6, 1994, and the following was submitted by Mr. Lincoln.]

### COST TO DEPARTMENT

Question: Could you provide the estimated costs to the Department caused by the failure to complete promulgation of regulations in a timely fashion?

Answer: There were no costs associated with the Department not promulgating the regulations. Since 1988, the amount of funding under tribal contracts has more than doubled from approximately $200 million to over $500 million for both services and facilities construction in FY 1994. Every effort has been and will continue to be made to more than complete the regulations development in a timely manner.

Mr. RICHARDSON. Yes, and what I will do is I will submit the questions that I was going to ask you for the record to all of you. And what I would like to do, Ms. Cohen, is maybe visit with you and Mr. Collier and Ada Deer, and let's talk about all of these bureaucratic issues that I just mentioned. I think that—I am impressed by your energy in trying to resolve this. I am not sure that the bureaucracy is responding to you.

But if we could talk about this issue, self-governance, the BIA reorganization, you know, the endless new deadlines and endless new procedures that the bureaucracy seems to be convincing you, and I know how they work, that they are needing. And maybe we can come to some closure on—and we can be used to help you.

I just think that what we are seeing is more than what—we are already—this is almost the end of the second year of the administration. And August of 1995, that is almost close to the convention, isn't it? No, that is 1996. And then I suspect we are going to have to take some legislative action on these regulations, or—I just think that we have to move more speedily, and I would encourage you and Ms. Poag, too, we have got to just seize control of the BIA. And we are losing time.

And all of this talk about debureaucratizing and executive orders to reduce regulations, it is just not happening. And the only faith I have is the fact that it is people like Secretary Babbitt and Collier and Ada Deer and Faith Roessel, I worked with Faith over the years, and I know that—the staff—here is 392 pages of regulations, proposed regulations, the Department of Interior, Assistant Secretary of Indian affairs, 40-page bill. This is not us, is it? Oh, all right. Well, I want to—does the gentleman want to close?

Mr. FALEOMAVAEGA. I just want to, and I am sorry if I am being somewhat repetitive, if the question has already been raised, and it is just to—for in fairness to the members of the panel, this is not anything in any personal way against all of you. I realize that some of you have just come on board.

Is it because of lack of resources that we have this sense of frustration with the Agency, that you are just not able to implement or promulgate these regulations? What seems to be the problem? Is it the logistics, just having a difficult problem consulting with the tribes? Or why six years? Why is it taking this long and still we have not gone this far in getting these regulations going?

Ms. COHEN. I don't think that we can speak to the causes of the delay in the past administration. Since we took office, the need for these regulations came to our attention.

We reviewed the regulations, we talked to tribes, and we have moved with some speed, perhaps too deliberate speed, but we have moved with some speed. These regulations have a high priority. We have gotten them out now for comment and we will try to work to move up the August 1995 deadline to get final regulations sooner.

Mr. FALEOMAVAEGA. So this—have you received any orientation from the permanent cadre that have been before you as to their frustrations perhaps that they share with you, why they have been unable to come up with the goods on this?

Ms. COHEN. Why the previous——

Mr. FALEOMAVAEGA. Yes.

Ms. COHEN [continuing]. political appointees? No, they didn't share with me why they were not able to get these out.

Mr. FALEOMAVAEGA. I mean what about the permanent cadre? The mid-managers are the ones who are still holding on to the fort while the political guys leave the administration.

Do they share with you what has been their frustration for the last six years, why they just were not able to move forward with these regulations?

Ms. POAG. I think a lot of what the Chairman said is correct, that there are problems with bureaucracy, that this is a complicated regulation, we did need to consult with tribes. I think the—we do not agree with the process that was used whereby the Federal agencies went behind closed doors for two years, but I think that certainly contributed to the problem.

There were disputes within the Department because this is not just a BIA regulation, it affects other bureaus as well, so there was a great deal of talking. But I do think we are on course now, we have got the procedure in place to consult with tribes and to bring this to closure. So I think we are now off the path of delay and back on the——

Mr. FALEOMAVAEGA. And with the resources you now have in hand, you are absolutely certain by August of next year these regulations will be coming forward, be forthcoming?

Ms. POAG. I cannot say I am absolutely certain that will happen. I don't think anybody can. We don't have control over the tribes and we don't know what is going to happen. But I can tell you, to an absolute certainty, that we will do everything in our power to meet that deadline.

Mr. FALEOMAVAEGA. Mr. Lincoln?

Mr. LINCOLN. Yes, Congressman, I think there is another factor here that contributed to the delay, and that certainly is the necessity for the Department of Interior and the Department of Health and Human Services to come up with a single regulation.

That absolutely being a critical, necessary step to take, but one that did contribute to the delay. We do now have, though, a single regulation that the two departments have agreed upon, and we do now have a very good process, we believe, to resolve any differences between the administration, Executive Branch of government, and tribal governments.

We are committed to the process also from the Indian Health Service standpoint, and we believe the Department of Health and Human Services as it appoints a negotiating team to participate with the Department of Interior and with tribal governments will have the necessary delegated authority also to push these regulations forward on a faster track.

Mr. FALEOMAVAEGA. So what you are saying, for all these years there has been problems administratively between the two agencies to begin with, jurisdictional fights, problems of who has the say on this issue and that issue.

Has that been the experience all these years?

Mr. LINCOLN. Congressman, I believe that there have been differences in the way the two departments have interpreted the statute. There are differences in the way that we clear departmental positions between Interior and HHS.

And in the negotiations—I was one of the individuals, perhaps the only person in this room, that was on the negotiating team between Health and Human Services and the Department of Interior. And I can assure you, those were very spirited negotiations as we attempted to come up with a single regulation.

We believe that is behind us now. We do have a single regulation and we do—now it is time to certainly reenter negotiations. And we are committed to move the process forward.

Mr. FALEOMAVAEGA. Thank you, Mr. Chairman.

Mr. RICHARDSON. Well, I am—I think you have gotten—you have gotten our message. I just—I just want you to go back and get moving. Did I hear you say, Mr. Lincoln, you have—IHS has not yet appointed your negotiating team to deal with this issue?

Mr. LINCOLN. No, Mr. Chairman, we are right in the process of having both the Department of Interior and the Department of Health and Human Services identify who is going to be negotiating, in addition to the 48 tribal representatives being identified. I think we are at the right place.

We do have a document that is going forward to the Department. We do not believe this to be something that would take months and months. We believe that once we move the document forward, it will be a matter of weeks. Because we have been working co-jointly or at the same time with the Public Health Service and the Secretary's office. So we feel that it will just take us a week or so to do that.

Mr. RICHARDSON. OK. All right. Well, Ms. Cohen and Ms. Poag and Ms. Roessel, I would like to do that meeting very soon in which we address all of these issues. And I know you are sincere and earnest. I wish you well, but let me just say I guess the proverbial I have seen this before. And I don't want you to be victimized by the bureaucracy. I see you as reformers.

Right sitting in back of you is my friend, Mike Anderson, who for years would sit in the witness chair and told me all the BIA problems. Now he is over there. I am not saying he is the problem now, but I know he knows some of these frustrations that all of us have had.

And this is why we are so excited at the advent of this new administration and the new team at Interior, and why you have a great responsibility to clean this mess up. It is a mess over there. And just don't get—there is a word that I am not going to use, which is perfect for this, I know what—drawn in to this bureaucracy that just is known for stifling any kind of change, and they want more regulation. I can see them doing this to you.

So with that, I want to thank you for coming. We appreciate your testifying. And I do wish to visit with you before we adjourn for the August recess because we have to make some decisions on what bills we are going to move, and I have great respect for Secretary Babbitt and Ada Deer, and I don't want us to be in conflict. So again——

Ms. COHEN. Thank you, Mr. Chairman. We will make an appointment with you as soon as possible. We look forward to talking about this and all the other issues with you. And in addition, the staff that is working on this would be pleased to work with your staff.

Mr. RICHARDSON. OK. Thank you.

## STATEMENTS OF PHILLIP MARTIN, CHIEF, MISSISSIPPI BANK OF CHOCTAW INDIANS, PHILADELPHIA, MISSISSIPPI AND EDDIE TULLIS, CHAIRMAN, POARCH CREEK BAND OF INDIANS, ATMORE, ALABAMA

Mr. RICHARDSON. We will now move on to the second panel, the Honorable Phillip Martin, the Chief of the Mississippi Band of the Choctaw Indians, Philadelphia, Mississippi. The Honorable Eddie

Tullis, Chairman of the Poarch Creek Band of Indians from Altmore—Atmore, Alabama. I think—let me welcome both of you. Mr.-- Chairman Tullis, I know you, don't I?

Mr. TULLIS. Absolutely.

Mr. RICHARDSON. Where were we together, at the——

Mr. TULLIS. I drove you around when you were at the NCAI at Green Bay, we spent a good bit of time in an automobile traveling around looking at Green Bay.

Mr. RICHARDSON. Well, it is a pleasure to see you again.

Mr. TULLIS. My pleasure.

Mr. RICHARDSON. And, Chief Martin, it is a pleasure to see you, too. Chief Martin, why don't you start out? Again, welcome. We would like to have you summarize in five minutes because I know we have probably got a lot of questions for both of you.

## STATEMENT OF PHILLIP MARTIN

Mr. MARTIN. Thank you, Mr. Chairman. I don't think I have formally met you, but after hearing you talk today, I feel like I know you. Thank you for the opportunity to be here and make a few comments on the proposed changes to the Self-Determination Act.

I have submitted a written statement and I won't read that, but I would like to make a comment or two extemporaneously. I believe the amendment that you are proposing to the act is one that we like. I think that new amendments are needed and we don't need to wait.

I support this bill because—and I support the idea of going forward with it. I think we have spent too much time within the Bureau to make some changes. And I don't think that is worth waiting for. The big problem that I see, and you hit upon it, too, is the bureaucracy. We have a lot of—I have a lot of experience in dealing with the bureaucracy. And I think that is what the Secretary and these young ladies ought to be working on.

How do you change the bureaucracy? What are you going to have to do to have them respond to the law and the regulation that they are supposed to carry out? And some of us have had a lot of fights with the area offices. You know, that is sort of the problem.

The bureaucracy is strong at the area offices, and at the central office they have good communication and if a tribe wants to get ahead, usually, you know, those kind of tribes are discouraged. But nevertheless, we have made a lot of progress.

I would just like to briefly mention that when I started working with the tribe in 1957, we didn't have anything. We didn't have any money, actually still don't today. But we have made a lot of progress. We have a contract, over $30 million, with the government, including BIA and IHS. We have about $70 million of sales every year with our industry, which makes it a total of around $100 million that the tribe administers in one form or another. And we are not afraid to contract, but we are highly leveraged, too.

In order to do this, we had to borrow money and take a risk that is required in business. And so far we have been successful and we continue—we will continue that path. In addition to that, $70 million, we just started our casino and we are projecting maybe another $100 million in sales. This equates to about 4,000 jobs that we have created as of today.

And progress, tribes are making progress throughout Indian country. We don't need a bureaucracy to hold us back. I believe, I strongly believe and I have believed this for a long time, we don't need a lot of regulation. We don't need—we need a law that is more in tune with the government-to-government relationship concept.

And that means less regulation, more responsibility for the tribe, and let them be responsible for their action and do the things that they know has to be done at the local level without Federal, too much Federal intervention. And I strongly support those concepts, and I support Senator McCain's bill.

I haven't seen his changes yet, but when they first come out, talked about it, the concept, I supported it strongly and I believe that I support, continue to support that as well. So I would strongly urge you to move forward with your plans and let's get the two bills presented at both houses and come up with the best solution to the problem that we know exists, and give the tribe the necessary authority and rights to move forward with contracting and develop strong reservation economy and provide jobs and the other opportunities to its people.

And I think that is the whole concept behind this at the beginning, and it is not working as it is now. And I would strongly like to see changes made in this act.

Thank you very much.

Mr. RICHARDSON. I want to thank you.

[The statement of Phillip Martin may be found at end of hearing.]

Mr. RICHARDSON. I am going to excuse myself for a few minutes and the gentleman from American Samoa will chair. I will be back shortly.

Mr. FALEOMAVAEGA. [Presiding.] Please proceed.

## STATEMENT OF EDDIE TULLIS

Mr. TULLIS. Thank you, Mr. Chairman, and Mr. Richardson. I certainly, as you leave, I understand, but I want you to realize that one of the reasons I am here today is to express appreciation of my tribes and other tribes in the efforts that you have to alleviate this problem we find ourselves in. And I appreciate your efforts on our behalf.

I am here today to speak in a dual capacity, both as the Chairman of the Poarch Band of Creek Indians of Alabama and also as the Chairman of the United South and Eastern Tribes. And I find myself in a situation where I don't—do not totally understand what is happening.

We have started this process and I have to give credit to our former director, Mr. Lionel Johns, who passed away a little over a year ago, that had been very actively involved in this process. And then I have to think about the number of hours that not only my local staff or my own tribal staff have spent involved in this process, but the number of hours that we, as an organization, that USET have spent discussing amongst ourselves, amongst the tribal leaders and the tribal staff, but also the number, the great number of hours that we have dedicated to this effort.

I had an opportunity to attend that meeting in Albuquerque last May. I went to that meeting thinking that we had had a staff of people and a group of people from the other side of the questions, had spent an awful lot of time negotiating back and forth and having consultation with the tribes around the country. I thought we were going there to see the results of all of that work. I went there and found total frustration on the part of the tribes, went there and found that those people who had been negotiating and had been involved, from a tribal point of view, were of the opinion that we had went some way or by some reason, the process went into reverse and was headed back toward the starting point again.

So we are here today as tribal leaders who are very frustrated with this process. And therefore it is with that in mind that we come here and tell you that we support an effort for this Congress to move forward to solve this problem. We feel that if this continues to go through the process and we go back to almost ground zero and start over again, that there is no way assuring without action by this Congress that the bureaucrats will set themselves a deadline.

We realize that there are efforts out there and certainly there is a commitment on the part of the tribes to see this to its finality due to the fact that we view it as something greatly beneficial to the tribes. If we can have the bureaucrats remove some of the impediments to self-governance, if we can have them remove some of that regulation that we spend so much of our time at the local level trying to figure out what they mean by those regulations, certainly it can be beneficial to the tribes.

So we are here today to support the efforts of the Congress to solve a problem that the bureaucrats and the tribes together have not been able to solve. So we are certainly here in support of 4842. We realize that there are an awful lot of technicalities about the bill and the next panel certainly will address a number of those, but I can assure you that there is an awful lot of support in Indian country by tribal leaders of the effort to bring this to a conclusion.

Thank you for the opportunity to be here today.

Mr. FALEOMAVAEGA. Thank you, gentlemen.

[The statement of Eddie Tullis may be found at end of hearing.]

Mr. FALEOMAVAEGA. I just want to ask a couple of questions. In your attendance at that meeting that was held in Albuquerque about the 638 law, I understand again and reemphasizing not only by way of total frustration from the tribal leaders, but just wanting to get a sense of your observations during that conference, did you sense that part of the problem was really with the tribal organizations as to why these regulations never seemed to come about, because of this consultation desire that the bureaucracy downtown wanted to continue?

Mr. TULLIS. Sir, I am the first to say here to you and admit that there is an awful lot of tribal bureaucracy that develops also. And I think one of the things that had happened is that the whole process got wrapped up in—in the difference in Indian country.

And I think those people that were involved from the tribal perspective allowed the bureaucrats to play on some of the differences that you have amongst the regions in this country. We realize there is over 500 Indian tribes and we are not all the same. All of us do not have the exact same needs and the exact same desires out there.

But I think there was an overwhelming majority of the tribes there that realized that this process needed to move forward, and we did not need to continue to negotiate, we did not need to continue the process of trying to satisfy every one of the tribe's concerns there, that we need to move on with the process.

Mr. FALEOMAVAEGA. Mr. Martin.

Mr. MARTIN. Yes, I don't know about the—what the problem was, but one of the things that I saw was we were not making very much headway, so I made a motion to support Senator McCain's bill.

And everybody there, it was unanimously supported, that concept, that we go ahead and ask Congress to, and Senator McCain, to go ahead and develop his bill so that we would have a real process going on that would be the law that everybody supported. So we have a lot of support for legislative action to remedy this.

Mr. FALEOMAVAEGA. For the record, approximately how many tribal organizations were represented at that conference in Albuquerque?

Mr. TULLIS. I think all the major organizations were represented there, and they were a great number of the tribes. I am scared to tell you a number. I know it was probably closer to 200, 250 of the tribes had tribal representatives at that meeting. But all of the national organizations and all the regional organizations were represented at that meeting. So there was a very good tribal participation in the meeting.

Mr. FALEOMAVAEGA. Would you sense that a great majority of the organizations as well as the tribal leaders were in agreement and basically the bottom line, cut the red tape and let's get on with it?

Mr. TULLIS. I can assure you that was the consensus of that meeting because I talked to a number of those tribal loaders and, being involved in an organization as President of USET, I certainly feel that all of the organizations had had the time to formulate upon that would agree to that.

Mr. FALEOMAVAEGA. Were there any officials of the Department of Interior in attendance at that conference?

Mr. TULLIS. Yes, sir, all the way to Ms. Ada Deer. Matter of fact, one of the—one of the major discussions at that meeting was delaying the implementation of what was then the proposed regs. And Dr. Hill and Ms. Deer both participated in that meeting.

Mr. FALEOMAVAEGA. All right. Gentlemen, thank you very much for your testimony this morning.

## STATEMENTS OF BRITT CLAPHAM, II, ESQ., SENIOR ASSISTANT ATTORNEY GENERAL, NAVAJO NATION, DEPARTMENT OF JUSTICE, WINDOW ROCK, AZ; S. BOBO DEAN, ESQ., HOBBS, STRAUS, DEAN & WALKER, WASHINGTON, D.C.; BARBARA KARSHMER, ESQ., ALEXANDER & KARSHMER, BERKELEY, CA; AND KAY E. MAASEN GOUWENS, ESQ., SONOSKY, CHAMBERS, SACHSE & ENDRESON, WASHINGTON, D.C.

Mr. FALEOMAVAEGA. For our next panel we have Mr. Britt Clapham, II, Esquire, Senior Assistant Attorney General, Navaho Nation, Department of Justice; Mr. S. Bobo Dean, Esquire, Hobbs, Straus, Dean & Walker, law firm of Washington, D.C.; Ms. Barbara

Karshmer, Esquire, Alexander & Karshmer, Berkeley, California, law firm; and Ms. Kay Maasen Gouwens, of Sonosky, Chambers, Sachse & Endreson of Washington, D.C.

Welcome to the panel this morning, ladies and gentlemen. And I would like for Mr. Clapham to begin. For the record and without objections, all your statements will be made part of the record.

Mr. Clapham.

## STATEMENT OF BRITT CLAPHAM, II, ESQ.

Mr. CLAPHAM. Mr. Chairman, Members of the committee and staff, I think rather than go through my written testimony word by word in light of the Chairman's earlier introductory statements, it seems fair to say that the committee has a fairly firm understanding of the process that we have been through in the development of 638 regulations over the past five years and ten months, now nearly six years.

There are a couple of points that I would like to make and then pass on for others to discuss further. You have heard the officials from the BIA and Indian Health Service today describe the process that is beginning with the upcoming negotiations.

We understood and were informed, as recently as last week, the FACA process that has been described has also encountered some stumbling blocks and problems. There was an attempt to jointly fund this 48-person group. We understand that there is appropriation act issues that prohibit the authorization of jointly funding the FACA process.

We further understand that the two agencies have sought clearance through the upcoming 1995 appropriation to address that, but have not been informed whether that has been resolved at this point in time to allow the joint funding of an advisory committee under FACA.

I would also point out that no one during the testimony addressed the substance of the regulations proposed in January of this year. Frankly, these regulations narrow the contracting opportunities the tribes had before 1988.

And finally, I have to say, having gone through virtually every step of the way on behalf of the Navaho Nation and for a brief period another tribe, it seems as though the process that was described is not the one I participated in.

First and foremost, we don't have a joint uniform regulation, as proposed. And I guess the most troubling thing to me is that we talk about deadlines in this process. I don't recall that over this six years any deadline that has been established has ever been met.

That concludes my initial remarks. There are a couple of remarks I would like to make later concerning specific provisions in H.R. 4842. And I will do that following Ms. Gouwens's testimony, with the committee's indulgence.

[The statement of Britt Clapham, II, Esq. may be found at end of hearing.]

## STATEMENT OF S. BOBO DEAN, ESQ.

Mr. DEAN. Mr. Chairman, my name is Bobo Dean. I am here to testify on behalf of a number of tribes and tribal organizations whom we represented in this process and who are identified in the written statement that we asked to be filed for the record. I also will not read my statement.

I would like to comment first with respect to a couple of matters that have come up in the testimony earlier today. And specifically first, I think it was indicative that the Federal witnesses all left without listening to the two tribal chairmen who succeeded them. I think that probably was inadvertent, but it seems to me to—I could understand if they walked out on the lawyers, but it seems to me they should have sat here and listened to the statements from Chief Martin and the Chief of the Poarch Creek Band of Indians.

Mr. FALEOMAVAEGA. I think it might be proper, and certainly I will take this under advisement in my recommendation to the Chairman, from now on we will have the officials of the departments to testify last, so they will be sitting there, so they can all wait and listen to what the community people have to say. And that certainly will be my recommendation in the next round. I appreciate that observation.

Mr. DEAN. Secondly, I was disturbed by Mr. Lincoln's testimony that the departments have now achieved agreement on the regulations. They may have, in some areas at least, achieved agreement between themselves.

At the Albuquerque meeting, among the things that happened, one of the Federal representatives made reference to the difficulty of achieving consensus among tribes. A tribal representative got up and held up the proposed regulations and asked that any tribal representative who felt that these were acceptable should raise his hand. And no tribal representative raised his hand. Then he said will you raise your hand if you believe that these regulations are not acceptable? And every tribal representative raised his hand. And he said that is a consensus.

Now, there is a consensus among tribes that the regulations are unacceptable. What difference does it make that the two departments have reached an agreement? And the fact that Mr. Lincoln didn't seem to focus on that is depressing in terms of what is going to happen in the next round.

My clients, I believe, do support the position taken in Albuquerque that the agencies and the tribes should sit down again within this Federal Advisory Committee structure, but we are concerned as to what the outcome will be. Then I would like to say that there has been, and very correctly, emphasis on the delays, the failure to meet the deadlines, the fact we still do not have regulations.

What I have addressed in my written statement is what is wrong substantively with the regulations. There are two issues. One is delay, and the other is issuing regulations, which would be a nightmare. And if you speed up and issue these regulations or regulations very much like these that have not been completely rethought, that would not be what my clients would support.

Mr. FALEOMAVAEGA. So what you are saying, Mr. Dean, that even though we may meet a deadline and issue regulations, that does not necessarily solve the problem?

Mr. DEAN. That is correct.

Mr. FALEOMAVAEGA. It will probably make it even more——

Mr. DEAN. It could be worse.

Mr. FALEOMAVAEGA [continuing]. worse, all right.

Mr. DEAN. Finally, in my written statement, I referred to several issues that are wrong. I will not repeat those. We also will provide to the committee staff the comments that we are filing on behalf of our clients with the departments, which are about 80 pages detailing areas of the regulations that present problems. I would, however, like to state very briefly one of the areas.

Mr. DEAN. [Continuing.] It is the scope of self-determination contracting. That is covered in Section 900.106 of the regulations, which reads like instructions either for a board game or for a computer game in which it is an assault on a medieval fortress and you have battlements and you have moats and you have drawbridges, and behind them you have the Federal bureaucracy trying to hang on to their prerogatives and their prerequisites. Just looking at 900.106(h) would demonstrate to you why tribes are very upset by these regulations.

Thank you very much.

Mr. FALEOMAVAEGA. Thank you very much.

[The statement of Mr. Dean may be found at end of hearing.]

Mr. FALEOMAVAEGA. Ms. Karshmer.

Ms. KARSHMER. Might I defer to Ms. Gouwens first, Mr. Chairman?

Mr. FALEOMAVAEGA. Certainly. Ms. Gouwens.

## STATEMENT OF KAY E. MAASEN GOUWENS, ESQ.

Ms. GOUWENS. My name is Kay Gouwens, and I am a lawyer with the law firm that represents tribes and tribal organizations nationwide. I am here today in place of my partner, Lloyd Miller, who was invited to testify and had hoped to come, but finds himself deep into a very critical phase of the *Exxon Valdez* oil spill litigation in which our firm represents about 4,000 members of the Alaskan native plaintiff class; and under the circumstances, he concluded he, regretfully, simply could not appear himself today. I will do my best to fill his shoes.

On the matter that is now before the subcommittee, our firm is representing a coalition of tribes and tribal organizations. The members of that coalition are as follows: the Jamestown S'Klallam Tribe of Washington; the Yukon-Kuskokwim Health Corporation of Alaska, which by the way runs a 40 million IHS hospital and a regional health care delivery system that serves a vast geographic area larger than the State of South Dakota; UIC Construction, Inc., which is the construction subsidy of the Barrow, Alaska Village Corporation; SKW Eskimos Inc., a construction subsidiary of Archi Slope Regional Corporation of Alaska; the Southern Indian Health Council of California; and the Ramah Navajo School Board which, despite its name, actually runs a host of not only education, but other social service delivery programs for the Ramah Navajo people of New Mexico.

In preparing for this hearing today, I thought it would be somewhat instructive to go back and look just very briefly at the legislative history of the 1988 amendments that we are all here addressing today to see what was on this committee's mind when it acted on the bills that ultimately became those amendments; and I would just like to read a couple of sentences from this committee's report of 1986—August 7, in fact, 1986, one week shy of eight years ago.

The committee said this: It seems that since its inception—the inception of the act in 1975, that is—instead of focusing on self-determination, the agencies have only focused on developing complex contracting and program regulations. In this maze of rules and regulations, the original intent of the Self-Determination Act has somehow gotten lost. The report continues that the committee hopes that in the future the agencies, in implementing the Act, will not treat the Indian tribes as regular government contractors, but as self-governing entities with attributes of sovereignty.

Well, nearly eight years later, I think it feels to most people here like deja vu all over again. The veterans of the process are trying to get this act to be implemented the way Congress initially intended, and I think can be excused if they feel at times as if they have been caught in a time warp. But of course they haven't been; time has been passing, six years have passed since Congress directed these agencies to, within 10 months, promulgate regulations which they were expressly instructed should be simple, straightforward and not contain unnecessary requirements. And what we are faced with instead is a several-hundred-page document that is anything but simple, extremely complex and flies in the face of the mandates Congress stated in both the original act and in the 1988 amendments.

Given the history of this process, our clients have just reached the conclusion that enough is enough. We don't doubt the sincerity of those agency witnesses who testified this morning about their true intent to improve this process and draw this interminable regulatory process to a close. But I guess the *Exxon Valdez* case is on my mind, because the image that I have in my head is of a massive oil tanker filled with oil going forward on a course, and the man or the woman who is at the helm of that vessel can't turn it immediately. It takes a long time from giving the direction to getting the vessel to move. And we are just confident, given what appears to be a very entrenched and resistant midlevel bureaucracy, that these well-meaning people cannot turn this tanker—certainly not by the rather optimistic August, 1995 deadline that the tribes and the agencies are striving to meet on the proposed regulations.

I would just like to comment very briefly, echoing some of the other panelists' comments this morning, that I would hate for anyone to be left with the impression that because the tribes requested additional time to come in on these regulations and endorse the idea of an advisory process, even after August, and agreed on a goal of an August, 1995 final remembering date, that the tribes and tribal organizations have really embraced this process. They are, in fact, hostages to this process.

The only reason that more time is needed to comment on these regulations is because they are so massive and so confusing and so contrary to the interests of tribes that, of course, tribes have to try to have as much effective further input into these as possible, before they are enacted. In fact, I think there should not be a need for further process here.

The positions of tribes on the vast majority of issues that have arisen in the past six years in self-determination contracting are well-known, and have been stated over and over again, and are reflected in the joint tribal Federal draft regulations that were rejected by the previous administration, and have been submitted in official commentary on the proposed regulations. What we need is resolution of these issues. And I think the record is complete enough that this committee and this Congress can resolve those issues legislatively and put an end to the ability of these agencies to creatively misinterpret the mandates of this statute.

It is for that reason that our clients heartily endorse the provisions of H.R. 4842, which was introduced by the Chairman and Vice Chairman, I understand, earlier this week.

I would just like to very briefly touch on a couple of the provisions of that bill. I believe Mr. Dean indicated that one of the most frustrating provisions of the proposed regulations is the provision that deals with the so-called "contractibility" issue that would attempt to insulate the Federal agencies from having a vast variety of their functions taken over by Self-Determination Act contractors. The proposed bill would resolve this problem in a couple of ways.

First, it would—we shouldn't need clearer language, because the language in the Act is already pretty clear on this, but it would state even more clearly that programs that are subject to being contracted under the Act include administrative functions of the Department of the Interior, the Department of Health and Human Services, which support the delivery of services to Indians, including those administrative activities that are related to, but not part of the service delivery program, which are otherwise contractible without regard to the organizational level within the departments where such functions are carried out.

The bill also takes a very positive step, in our view, of clarifying that a decision by the Department that a particular program or function is not contractible is not some kind of threshold decision that is insulated from the protections of the so-called "declination" process, but is in fact a decision to decline a contract that must trigger all of the procedures that Congress has put in place for protecting tribes when such a decision is made.

We would also—I mean, basically we endorse all of the provisions of this bill. I would just hit on a couple of highlights.

As I think this committee well knows, tribal reporting requirements under current law, as proposed in the draft regulations, is truly crushing. The draft bill would address this problem by continuing to require tribal organizations to submit single agency audits which, after all, are probably the best means for ensuring that contracts are properly operated, and all other reporting requirements will be subject to negotiation between the agencies and the tribes. And this means that if there is a reporting requirement that the agency thinks is crucial and the tribe refuses to agree with it, the agency is free to decline the contract, and then the tribe has all of the procedural protections that go along with the declination process.

I think I will pass on some of the other more technical provisions of the bill, except again to say that we think it is a wonderful bill that resolves virtually all of the issues that we know have been raised in recent years and resolves them in a way that should further the purposes of this act.

Mr. FALEOMAVAEGA. Thank you.

[The statement of Mr. Miller may be found at end of hearing.]

Mr. FALEOMAVAEGA. Ms. Karshmer?

## STATEMENT OF BARBARA KARSHMER, ESQ.

Ms. KARSHMER. Thank you. My name is Barbara Karshmer, and I am an attorney from California; and I am here today on behalf of three tribal consortiums in California that represent 30 tribes, as well as another individual tribe. Together, these three consortiums and the individual tribe provide services to more than 40,000 Indians in Southern California.

They have been involved, as have I, in the regulation drafting process over the last five years.

I think you have heard today that there is unanimous discontent with both the process and the results of that process in Indian country. I think it is a safe conclusion to say that any continued process is not likely to produce any different results. They may be marginally better in terms of the contents of some regulations, but not sufficiently significant to wait another year.

I think it is naive, as well, to think that these regulations can be fully promulgated in the course of one year from now. I think, more likely, it will take at least two years. Tribes have been waiting for six years at this point to reap the benefits of the 1988 amendments to the Act, and to ask them to wait another two years, I think, is unconscionable.

What happened from my perspective in the drafting of the regulations is that the agencies involved forgot that statutes passed for the benefit of Indians are to be liberally construed in their favor; and instead, made the regulations as restrictive as possible and in the government's favor rather than that of the tribes. I gave examples in my written testimony of the many areas that I feel are strictly illegal in the regulations in that they are specifically contrary to the provisions of the law. And I won't go through that, but just refer you to that.

I am here today on behalf of my clients to urge that you immediately pass H.R. 4842. This bill takes care of the problems that the tribes have experienced since the inception of the Act, and certainly since 1988, and avoids the need for going through a process that most tribes believe will be useless.

I would like to do two things very quickly today. One is to discuss your model contract that appears at Section 108 of the Act, and also note a few minor technical clarifications that we would recommend be made to the Act as well.

Since the mid-1970's when the Act was passed, I have personally been involved with representing tribes in negotiating 638 contracts. Problems we faced are that the requirements have changed, year to year, in those contracts; the language of the contracts has always changed from year to year; and the contracts include, by reference, long lists of other provisions, other paragraphs, other circulars and other requirements that the tribes are required to comply with. These requirements are nowhere to be found in one place; and often when you ask the agencies for these requirements, they can't even provide you with copies of them, so that they are unavailable for the tribes to review to determine whether they can, will or wouldn't want to comply with them at the time of negotiation.

All of these requirements have always been nonnegotiable, so the tribes have to take them or have no contract; and the requirements vary from contract to contract, depending on who is negotiating the contract, which agency and which tribe it is with.

We strongly support, for these reasons, your approach of providing a model contract in the legislation.

As you are aware, I am sure, this approach has been successfully utilized in Title III, the self-governance aspects of the Indian Self-Determination Act; and there is a model compact for that which we believe is similar to what you have done in your provisions. We believe that what you have done is sufficiently flexible to meet both the needs of tribes and the administration and to allow them to interact on a government-to-government basis without hampering either side from having a workable contract.

I think that the Act will create a simplification of the contracting process. It will eliminate disputes over onerous contract terms and will create the result that tribes, wherever located, will be treated uniformly; and that is certainly not the case now.

A few parts that deserve special attention are your inclusion at Section 1081(b) of the canon of statutory interpretation that tribes—that statutes for the benefit of Indians are to be liberally interpreted in their favor. I think this will remind the people negotiating the contracts on behalf of the administration, every time they have to negotiate a contract, of what this law is really about.

I think your tribal court provisions are excellent, especially insofar as they allow for alternative tribal resolution bodies to be used in the place of tribal courts. In California, at least, with more than 110 tribes, only two of those tribes have tribal courts.

I think the three-year contracts, with annual funding agreements, are excellent. The provisions regarding limitation of costs are very valuable, and I think Mr. Clapham will comment on those briefly.

I think—I could go on through the whole model contract, but I think that the provisions here are really what is needed. I think the contract is well drafted. It is consistent with the Act and its intention, and it is workable for both tribes and the agencies.

My clients strongly endorse the model contract and the Act as a whole, and urge that you pass it promptly and not be delayed by the perhaps naive promises of the administration witnesses that were here today. We would also ask that you take a look at our comments in regard to changes to the declination time limits, rights to engaging discovery, burden of proof, and restriction on regulations that are specific wording we have suggested in my testimony.

I, with that, will thank you for the opportunity to appear today and turn the mike back over to Mr. Clapham.

[The statement of Ms. Karshmer may be found at end of hearing.]

Mr. FALEOMAVAEGA. Thank you very much. I do have some questions I would like to—Mr. Clapham, did you have a couple more comments to make?

Mr. CLAPHAM. Mr. Chairman, yes, I did. Thank you for the opportunity.

I wanted to hit on four sections just very briefly in H.R. 4842. The first is Section 5, which deals with the regulatory process.

As written, it limits regulations to five areas that are procedural in nature. We think that is a workable approach; it gives the agencies 12 months to promulgate regulations in those five areas through the negotiated rulemaking process under the negotiated Rulemaking Act of 1990. There is no impediment here that would prohibit the agencies from promulgating internal rules under the Act. I think the Act is clear in that regard. So the internal operations of the agencies with regard to 638 contracting could still go forward.

Finally, as Ms. Karshmer and others have pointed out, there are some changes in 4842 that deal with limitation of cost, that ensure that adequate funding will be provided to the tribes in the process of carrying out these contracts; and if it is not, those activities can be shifted back to the Federal Government once those funds have been expended, and not added to meet the needs of the programs carried on. There are amendments in the appeals section to allow a tribe to exercise an option between an administrative appeal or go directly into the Federal District Court for declination appeals.

Finally, a matter that has been of interest to the Navajo Nation, my client, for this whole period of six years, the Act specifically authorizes the use of tribal preferences, the hiring and contracting process in implementing a 638 contract.

For the record, I will be submitting when I return to Window Rock, resolutions of the Intergovernmental Relations Committee of the Navajo Council that support—have reviewed and authorized and support S. 2036, as revised, the bill that was before them prior to this hearing. I am sure they will take similar action on H.R. 4842 in the future.

Thank you.

Mr. FALEOMAVAEGA. Thank you very much.

I have no doubt that all of you members of the panel certainly have held your given positions with distinction as expert attorneys in your own right; and I suspect also our friends downtown, who wrote hundreds of these pages of so-called regulations, are also attorneys of their own distinction. I am getting a little frustrated right now that this is a battle between lawyers who continue to do these things and seem to cause more problems than actually finding a solution to these problems.

I would like to ask you, members of the panel before us here, do you think that perhaps the law that was enacted six years ago—was the language in that statute so bad or so vain that the attorneys couldn't write their regulations properly? Was that the reason why they couldn't do it? I mean, I would like your opinions on this, since you are expert in interpreting the law in your own right as attorneys.

Mr. CLAPHAM. In response, I would have to say, I thought the language was clear. I thought that the regulations could have been written and thought that the regulations were written in 1989 after the two——

Mr. **FALEOMAVAEGA**. I mean, this law wasn't 2,000 pages; I mean, it was plain, simple, farmer's language. Was this written by attorneys, too, that caused the confusion?

I am sorry, I didn't mean to interrupt; I just wanted your honest opinion. What was the problem?

Mr. **CLAPHAM**. I think that the comments earlier in the hearing, of the Chairman about the bureaucracy, contributed greatly to the problems with the regulations. I also believe that the expansion of the 638 contracting process to bring in the non-Indian bureaus, folks who had not been familiar with 638 contracting in the Department of Interior may have contributed to some of the confounding nature which we find in the regulations now.

Mr. **FALEOMAVAEGA**. Do you think there is some greater truth in—I don't know which Henry that was in the Shakespeare era, Henry V or Henry VIII—with the admonition, the first thing we do is kill all the lawyers. I mean, I see the frustration of the tribes; and I am sure all of you are frustrated yourselves in trying to work this thing out for your clients. I am sure you are doing an honest job and trying to give them the best representation. But, by golly, I suspect that these ghost attorneys that have been writing these regulations downtown also is part of the problem.

I was wondering, could it be that this legalese has gotten so bad here in Washington, D.C. that we seem to miss—forget smelling the flowers, while going through the forest and not seeing the light of these things?

I don't know. Please enlighten me on this.

Ms. **KARSHMER**. I would like to just respond that I don't think it is legalese that is the problem; I think it is the basic concepts that are the problem. Lawyers are new lawyers; we have bureaucratic inertia that we are dealing with. As my colleague suggested, we have this big ship going in a direction that just can't be turned.

I think we have a problem dating back—I noted in my written testimony——

Mr. **FALEOMAVAEGA**. But, you see, the captain of the *Exxon Valdez*, I understand, was drunk.

Ms. **KARSHMER**. I don't cast those aspersions on anyone in the administration.

Mr. **FALEOMAVAEGA**. I hope we don't have drunken lawyers drafting these regulations.

Ms. **KARSHMER**. I can only speak for myself.

Back in 1975, when the law was first passed, BIA officials went from reservation to reservation in California telling the tribes that this was termination, that BIA was going to be wiped out, that there was going to be no one to protect the interests of tribes, and therefore, tribes should not be favorably inclined to contract under the Act.

What happened instead of that was that bureaucracies developed regulations that they would have to implement; they would have to have a million people on staff to control these contracts with the tribes. I give the example in my written testimony that in 1975, there wasn't even an area office in California for the provision of health care. There wasn't a single IHS service unit in California; there was no care provided by IHS for Indians in California.

Today, there is still no care provided by IHS for Indians in California. All the care is provided through contracts with tribes. Yet from 1975 to the present, there is now more than 125 IHS employees in the IHS area office in California to monitor contracts, to write contracts, to keep tribes in line. And I think it is this very conception that tribes cannot be trusted with 638 contracts to do what is right, to operate contracts correctly, and to spend government money properly that is the impediment behind getting anywhere on these regulations.

Mr. DEAN. Mr. Chairman, if I could also respond. I want to say that I—Chip Martin has told me that I am making a lifetime career out of these regulations, and notwithstanding that, I don't think it is primarily the lawyers on either the tribal side or the government side. I think it is the interest of the bureaucracy.

In the course of the consultation, one Federal representative told the tribal representatives that what we are trying to do in this particular part of the regulations is to create a level playing field between the tribes and the Federal employees. That showed an approach which is understandable, because we are talking in some instances about the jobs of people and their families.

Recently, I have heard at one of the IHS area offices that that point was made, you are asking us to lay off people who have families to support.

Now, the fact is that the Congress has made a determination that tribes should decide that, whether they are going to be served by Federal employees or by their own people, under their own authority. So I think it is understandable that there is bureaucratic resistance. I think some on the government side have seen their clients as being the agency, and have not perhaps been sufficiently creative in carrying out the congressional purpose. But I think that is understandable.

I believe that the problem with the next round, if there is one, is whether the departments, the people that we heard today, will really force a total rethinking of the Federal approach. Because if they go back and try to justify all or most of these present regulations, it will be a waste of time.

Mr. FALEOMAVAEGA. Ms. Gouwens?

Ms. GOUWENS. I have nothing further to add. I think the statute has long been clear, and the problem is with attitude, not with language.

Mr. FALEOMAVAEGA. There has been another sense of curiosity too about the Bureau downtown, and the fact that—this is hearsay.

I don't know—maybe if you all have any knowledge—exactly what is the percentage of the people working for the BIA that are Native Americans, and through a self-perpetuating bureaucracy over the years, some estimates have been made that 80 percent of the people working for BIA are Native Americans.

Mr. CLAPHAM. I can't speak for the situation here in Washington D.C.; I simply don't know those figures. I would tell you that at the area office level and the agency office level on the Navajo reservation, the BIA's employees are predominantly Navajo—members of the Navajo Nation.

Mr. FALEOMAVAEGA. Well, I am sure this is the effort of every tribe, to get as many of the Members of the tribe to be a part of the process, participating in the tribal affairs, especially when a tribe is the size of the Navajo Nation with 200,000 now in number, the largest Native American tribe in the country. So you have to have a bureaucracy, you have to have a government to provide for the needs of some 200,000 men, women and children.

In what was discussed earlier with our friends from downtown, with the notion that these regulations should hopefully come about by August of next year, I notice in your testimony, Ms. Karshmer, that this is unthinkable, that it should be done in some way; and then I hear, I think, Mr. Dean's observation that sometimes we really don't know if these regulations are going to solve the problem. It might make things even worse.

So why should we even issue regulations at all? Just perhaps come up with another solution to the problem or a suggestion.

Ms. KARSHMER. I think that that is why the tribes are endorsing your bill, because they don't have the confidence that sufficient changes will be made in the regulations, or in the proposed regulations, to make them workable.

As my colleague earlier stated, tribes are really stuck. If they didn't agree to participate in the process of redoing the regulations, they would be stuck with the regulations there are right now. So they really had no choice but to say OK, we will try to make them better.

But at the same time, there was the unanimous vote in support of S. 2036, which is nearly identical, or will be nearly identical, as I understand it, to your bill, H.R. 4842. And I think it was a matter of not having choices and not seeing that there was going to be a sufficient agency response to tribal concerns.

As I am sure you are aware, tribes negotiated regulations for several years, thought they had a good set of negotiated regulations; then things were dropped for two years, and out came this set of regulations that looked totally different from what had been negotiated and, in many cases, was opposite to what had been negotiated by the tribes and had little relationship, if any, to all of the agreements that the tribes had thought they had reached during the initial negotiation period.

So that is why tribes are very skeptical about going forward with a regulatory process, but instead, prefer the process that you have taken or the approach that you have taken in your bill to avoid the need for such a process and deal with some of the substantive issues as well.

Mr. FALEOMAVAEGA. You might say then that the bottom line that all of you, by consensus, agree to the principles of the objectives of H.R. 4842?

Mr. DEAN. Mr. Chairman, if I could say, I have not had time to get instructions from my clients as to the House bill. I have reviewed it, however, and I have given your staff comments.

I believe that 95 to 98 percent of the provisions would have widespread support among Indian tribes. There may be several provisions that I can't be sure of until I get instructions from my clients. So that is the only reason I have not testified to endorse it at this time.

Mr. FALEOMAVAEGA. Well, one thing, I certainly enjoy working very much with your Chairman; and he likes to move on things once they start going, and you either be on that train or you are going to miss the ride. And I look forward to working with the Chairman on this bill that I think is going to move very quickly. We definitely want to do something about it.

I think, in fairness to our friends downtown—you know, we have only instituted this subcommittee since the beginning of this Congress, and perhaps, too, that we have had problems in previous years where we never had a subcommittee, it was always held on an ad hoc basis. I don't know what that means. But just the fact that we never had a subcommittee to directly address the issues dealing with Native Americans on the House side, we have had problems.

And, bless your heart—I know Chairman Udall; you couldn't find a person with more love and feel for Native American issues—but just the fact that we did not have an institutionally established subcommittee to handle the affairs of Native Americans, I think was perhaps one of the problems that we faced here on this side.

Thanks to Senator Inouye—you know, singlehandedly he went about to establish a select committee, now composed of 16 Senators, and now it is a regular committee of the Senate; and for years we never had that either.

So, hopefully, with the commitment that this President has made, inviting the leaders of the tribes from all over the country to the White House—I think it is a step forward—and hopefully his commitment and rhetoric is going to be matched with Secretary Babbitt's commitment that they definitely will do something about the needs of Native Americans.

I want to personally thank all of you for coming here this morning to testify. Keep us posted. The train is going to be moving, and we need your help and support from your respective tribes to see that we take corrective action on this problem that has been lingering for the past six years.

Thank you very much. The committee is adjourned.

[Whereupon, at 11:45 a.m., the subcommittee was adjourned; and the following was submitted for the record:]

# STATEMENT
# OF
# SENATOR JOHN McCAIN
# FOR THE OVERSIGHT HEARING ON
# THE INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT

BEFORE THE
SUBCOMMITTEE ON NATIVE AMERICAN AFFAIRS
OF THE
COMMITTEE ON NATURAL RESOURCES
UNITED STATES HOUSE OF REPRESENTATIVES

JULY 28, 1994

Mr. Chairman and Members of the Committee, I appreciate the opportunity to appear before you today to offer a few comments on the Indian Self-Determination and Education Assistance Act.

Before I begin, I want to commend Chairman Richardson and Congressman Thomas for introducing H.R.4842. The House bill is similar to S.2036, the Indian Self-Determination Contract Reform Act of 1994, which Chairman Inouye and I introduced in the Senate on April 20, 1994. The Committee on Indian Affairs will mark up S.2036 in a couple of weeks, and I am very hopeful that we will be able to pass S.2036 in the Senate prior to the August recess.

Mr. Chairman, I think it would be useful to review briefly the history of the Indian Self-Determination Act and to examine why the tribes have become increasingly frustrated with the existing regulatory process.

The 1975 Indian Self-Determination and Education Assistance Act provided tribes with authority to contract with the federal government to operate programs serving their tribal members. The policy of self-determination has proven to be very successful in terms of promoting tribal operation of federal programs and services administered by the BIA and IHS. The policy has its origins in President Nixon's 1970 "Special Message to the Congress on Indian Affairs" which stated:

> For years we have talked about encouraging Indians to exercise greater self-determination, but our progress has never been commensurate with our promises. Part of the reason for this situation has been the threat of termination. But another reason is the fact that when a decision is made as to whether a Federal program will be turned over to Indian administration, it is the federal authorities and not the Indian people who finally make that decision.
>
> This situation should be reversed. In my judgment, it should be up to the Indian tribe to determine whether it is willing to assume administrative responsibility for a service program which is presently administered by a federal agency.

In response to President Nixon, the Congress passed the Indian Self-Determination and Education Assistance Act in 1974 and it was signed into law by President Ford on January 4, 1975. Today, approximately $531 million of the funds appropriated to the BIA are administered by tribal governments under self-determination contracts. There are over four hundred contracts between Indian tribes and the IHS involving about $497 million annually. Indian tribes contract with the IHS for the operation of 8 fully accredited hospitals, 347 health centers and 70 service units.

During the consideration of the 1988 amendments the Senate Committee on Indian Affairs noted that the Act had failed to meet its goal of reducing the federal bureaucracy and ending the federal domination of Indian programs. In fact, there had been no reduction in the federal bureaucracy. Instead the Act had spawned an increase in federal officials who were employed to monitor self-determination contracts. The Committee found that federal bureaucrats had imposed administrative and reporting requirements on Indian tribes which were more stringent than the standards which would apply to direct federal operation of the programs, activities and services that the tribes were contracting to provide under the Act. So many layers of bureaucracy and rules had been imposed that the contract approval process required an average of 6 months rather than the 60 days mandated by the Act.

The Committee found that the original goal of ensuring maximum tribal participation in the planning and administration of federal services, programs and activities intended for the benefit of Indians had been undermined by excessive bureaucracy and unnecessary contract requirements. The 1988 amendments were intended to "... remove many of the administrative and practical barriers that seem to persist..." under the Act. The amendments required new regulations to be developed by BIA and IHS with the participation of Indian tribes. Senate Report 100-274, which accompanied the amendments, stated:

> The regulations regarding contracts under the Indian Self-Determination Act should be relatively simple, straightforward, and free of unnecessary requirements or procedures. The Committee intends...[the] regulations to become effective prior to the beginning of the first Fiscal Year following enactment of this amendment.

The 1988 amendments were intended to increase tribal participation through contracting in the management of federal Indian programs and to help ensure long-term financial stability for tribally-run programs. The 1988 amendments also required the Secretaries of Interior and HHS to consider and formulate appropriate regulations with the participation of the Indian tribes. The accompanying Senate report called for the two departments to issue joint regulations. Joint regulations were intended to permit the agencies to award contracts and grants to Indian tribes without the unnecessary burden or confusion associated with having two sets of rules for the same legislation. Joint regulations were also intended to permit both departments to implement the 1988 amendments and eliminate deficiencies or problem areas which inhibited contracting under the original act.

Nearly six years have passed since the enactment of the 1988 amendments. On January 20, 1994 the BIA and IHS finally published proposed regulations in the Federal Register. Despite the fact that the regulations were supposed to be "relatively simple, straightforward and free of unnecessary requirements or procedures," the new regulations contain hundreds of new requirements. As one commentator noted: "...in numerous instances [the proposed regulations] are more restrictive than existing regulations and raise new obstacles and burdens for Indian tribes seeking the opportunities for effective tribal self-government promised by the Act."

Tribal reaction to the proposed regulations has been extremely negative. Not only are tribes frustrated that the regulatory process is still on-going with no end in sight, but the fact that the proposed regulations in many instances are different than the understandings that tribes thought they had reached with the agencies during the joint tribe-agency consultations.

**S.2036**

S.2036, the "Indian Self-Determination and Contract Reform Act of 1994," is intended to prohibit the Secretary of the Interior and the Secretary of Health and Human Services from promulgating any regulations under the Self-Determination Act. It prescribes the terms and conditions which must be used in any contract between an Indian tribe and the Bureau of Indian Affairs or the Indian Health Service. No modifications could be made to any contract which is entered into under the authority of the Self-Determination Act without the written consent of the Secretary and the tribe.

It is entirely possible that regulations will be required in certain areas to effectuate the purposes of the Act. However, I believe the burden of proof should be on the federal agencies or any other interested party (tribes or lawyers) to justify to the Congress and to the tribes the need for such regulations.

On June 15, 1994, the Senate Committee on Indian Affairs conducted a hearing on S.2036. All of the tribal witnesses testified in strong support of this legislation. In addition, tribal witnesses requested that the Committee consider combining relevant portions of S.1410 (a bill introduced by Senator Inouye on August 6, 1993 which proposes various technical amendments to the Indian Self-Determination Act) and other technical revisions to ensure that the federal agencies do not substitute their views for that of the Congress and the Indian people.
My staff is currently working with various tribal representatives to draft an amendment in the nature of a substitute to S.2036.

Regrettably, this administration has voiced its opposition to S.2036. Assistant Secretary Ada Deer has asked the Committee on Indian Affairs to suspend further consideration of S.2036 until the BIA and IHS have renegotiated regulations for the Self-Determination Act under the Federal Advisory Committee Act.

Tribes are clearly frustrated and angered by the current state of affairs. I was critical of the last administration for their handling of this matter, and I note that this administration, which has said that it wants to reinvent government, reduce burdensome regulations, and listen more carefully to tribal governments also has failed to act responsibly. One year after this administration took office it made the decision to publish proposed 638 regulations that even the most casual observer of the five and one-half year regulatory process knew would be rejected by the tribes. Now the administration is asking the Congress to suspend further legislative action until it can complete another round of tribal-federal negotiations.

My response to the BIA and the IHS is straightforward. We have given the BIA and the IHS nearly six years to do a job that was supposed to take one year. The time has come for decisive action, and it is my intent to move legislation reforming the Indian Self-Determination contracting process this year. I look forward to working with you, Mr. Chairman, and Congressman Thomas to enact legislation that will recapture the vision that gave birth to the Indian Self-Determination and Education Assistance Act.

# STATEMENT OF BONNIE COHEN
# ASSISTANT SECRETARY -- POLICY, MANAGEMENT AND BUDGET
# UNITED STATES DEPARTMENT OF THE INTERIOR

Before the

COMMITTEE ON NATURAL RESOURCES
SUBCOMMITTEE ON NATIVE AMERICAN AFFAIRS
UNITED STATES HOUSE OF REPRESENTATIVES

Regarding

CURRENT EFFORTS TO IMPLEMENT THE 1988 AMENDMENTS
TO THE INDIAN SELF-DETERMINATION
AND EDUCATION ASSISTANCE ACT

July 29, 1994

Good Morning, Mr. Chairman and Members of the Committee. I am pleased to be here to discuss the Department's efforts to implement the 1988 amendments to the Indian Self-Determination and Education Assistance Act (the "Act" or "638"), particularly as these efforts relate to contracting in Departmental agencies outside of the Bureau of Indian Affairs ("BIA"). Before we begin, however, I would like to introduce Faith Roessel, Deputy Assistant Secretary, Indian Affairs, and Molly Poag, Director, Office of Regulatory Affairs. Faith will discuss current contracting efforts in the BIA, and Molly will discuss the current status of the proposed regulations.

## INTRODUCTION

At the outset, I want to assure you that we are aware of the frustrations experienced by tribes regarding implementation of the Act, and that we are working hard to remedy some of the problems that have led to these frustrations. Many of these problems, however, began during prior Administrations and, in the past 18 months, we have made substantial progress toward resolving them. For example, this Administration made publication of the rule a priority and published it within one year of taking office. Moreover, pursuant to tribal request, we are developing a process to attempt to reach consensus with tribes on the final rule, and we anticipate publication by August 1995, the date requested by tribes.

In addition, we are working to ensure that tribes are aware of and, if they desire, take advantage of contracting opportunities under the Act. The BIA has contracted out nearly a third of its program funds and anticipates continuing to expand the scope of its contracting activities. The Bureau of Reclamation ("BuRec") and the Bureau of Land Management ("BLM") also have programs contracted to tribes under the Act, and they expect to contract other programs in the future. We recognize, however, that we can

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do more, and we have instituted a review to determine which programs within the Department provide direct benefits to tribes.

This Administration recognizes our government-to-government relationship with tribes and is eager to work with them to finalize regulations implementing this legislation. We appreciate the opportunity to come before you and describe our efforts. We believe that we are on the right track to resolving many of the tribes' outstanding concerns. We are opposed, therefore, to any 638 legislation at this time and urge the Congress to defer legislative action until a final rule is completed.

## CONTRACTING EFFORTS IN NON-BIA AGENCIES

The Act was first enacted in 1975 to authorize tribes to seek contracts with the Department of the Interior ("DOI"), under which tribes would administer programs previously administered by the BIA. Programs eligible for contracting were required to have been established for the benefit of Indians under the Snyder Act[1] or any subsequent act. The Department generally has interpreted the original act to require only the contracting of BIA programs.

The 1988 amendments expanded the scope of the Department's contracting powers to include programs that were established for the benefit of Indians because of their status as Indians, yet are administered by agencies within Interior other than BIA. Since 1988, some non-BIA programs have been contracted. The Bureau of Reclamation ("BuRec") currently has the greatest portion of non-BIA programs administered under 638 contracts. Among other things, tribes currently are administering planning operations, environmental studies, and the construction, operation, and maintenance of water systems and water-related projects. For example, the San Felipe Pueblo and the Santo Domingo Pueblo are administering a program on the stabilization of the banks of the Rio Grande; the Tohono O'odham - Shuk Toak district are constructing water delivery facilities; the Navajo Nation is administering a program regarding safety of the Round Rock dam; and the Gila River Indian Community is constructing an irrigation system on the Sacaton Ranch. In anticipation of increasing its 638 contracting activities, BuRec is offering training to its employees in 638 contracting procedures.

The BLM also has entered into 638 contracts. BLM is estimating over $5,000,000 worth of programs in 638 contracts for FY 1994, a substantial increase over the roughly $200,000 it contracted in 1992. These programs all relate to cadastral survey work in Alaska.

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[1] 25 U.S.C. § 13.

Many other non-BIA programs, though currently not contracted under 638, are administered through cooperative arrangements such as memoranda of understanding or agreement. For example, the Chehalis and Quinhalt tribes are conducting fishery restoration activities funded by the Fish and Wildlife Service ("FWS") under the Chehalis River Fisheries Program, and the Hoopa Valley, Karuk, and Yurok tribes are conducting similar activities in the Klamath River Basin. In Alaska, the Tanana Chief's Conference and the Association of Village Council Presidents are collecting data that is used in FWS subsistence harvest management activities. The Blackfeet tribe in Montana has an assistance agreement with BLM for inspection and enforcement of Indian oil and gas operations, and many other BLM programs also are administered through cooperative agreements with tribes. The Minerals Management Service is conducting an outreach program to generate tribal interest in cooperative audit agreements under the Federal Oil and Gas Royalty Management Act.

Nevertheless, the majority of DOI programs contracted to tribes under 638 are through BIA, because of BIA's unique role within the Department and the American Indian community, and because of the statutory requirement that programs eligible for 638 contracting must be for Indians because of their status as Indians. In FY 93, BIA's total obligation for 638 contracts was roughly $700,000,000, or nearly one third of BIA's total obligations. The 638 obligation includes funds for tribes to administer at least a portion of virtually every existing BIA program, such as human services, education, public safety and justice, community development, resource management, trust services and general administration.

The Department recognizes, however, that more can and should be done to encourage non-BIA contracting. As a result, DOI has established an internal review process to identify non-BIA programs, such as programs currently administered under cooperative agreements, that may be subject to 638 contracting. This review, which is headed by the Department's Chief of Staff, is ongoing and is increasing the Department's understanding of programs that directly benefit American Indians. This increased understanding will enable Bureau Directors and office heads to actively promote these programs for contracting by tribes.

## CURRENT PROPOSED REGULATION

Under the current proposed regulation, a program is for the benefit of Indians because of their status as Indians, and thus eligible for consideration for 638 contracting, where Indians are the primary and significant beneficiaries of the program as evidenced by: (1) authorizing or appropriations legislation or legislative history; (2) implementing regulations; or (3) the actual administration of the program.[2]

The term " primary or significant beneficiaries" refers to those entities whose benefit or enhancement was the principal or a leading motivation for the establishment of the program or portion of the program.

Under this test, the Department must conduct a case-by-case analysis, examining the purpose, character, and administration of the program. In establishing a particular program, however, express congressional invocation of its constitutional authority over Indians will be considered evidence that Congress intended the program to be for the benefit of Indians because of their status as Indians.

In light of the Department's increasing understanding of its programs that benefit Indians in their status as Indians, and in light of our government-to-government relationship with tribes, I want to stress that the proposed test, consistent with the purpose of the Administrative Procedure Act, is merely a proposal. It may be modified based upon public comments received during the comment period, or as a result of the consensus-building discussions with tribal representatives that will occur after the close of the comment period. These discussions, and the process that led to development of the current regulation, are described below in more detail.

## DEVELOPMENT OF THE PROPOSED REGULATION

The Department recognizes that promulgation of the proposed regulation has been extraordinarily delayed. Most of this delay,

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[2] The proposed regulation provides that a program is for the benefit of Indians because of their status as Indians, and thus eligible for 638 contracting, where:

> "(A) The authorizing statute or legislative history specifically identifies Indians, because of their status as Indians, as primary or significant beneficiaries of the program or portion of the program or otherwise indicates that Congressional intent was to benefit Indians because of their status as Indians; or
>
> (B) The appropriation of funds for the operation of the program or portion of the program specifically targets Indians, because of their status as Indians, as primary or significant beneficiaries of the appropriations, as evidenced in the statutory or committee report language or the budget justifications submitted to the Appropriations Committee; or
>
> (C) Regulations or administration of a program or portion of a program identify Indians, because of their status as Indians, or reflect a Departmental intent to benefit Indians, because of their status as Indians, as primary or significant recipients of the services to be provided by the program or portion of the program.

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however, occurred during prior Administrations. When this Administration took office, the proposed rule had not been published and was over four years behind schedule. The rule quickly became a priority, however, and was published just one year later. DOI and HHS currently are working to develop a process that will permit tribes to participate fully in the development of the final rule.

DOI and HHS began drafting joint regulations implementing the amendments in 1988. Meetings with tribes were held throughout the country to discuss the amendments, and a working document was produced following two regulatory drafting workshops that included DOI, HHS, and tribal representatives. In December 1989, DOI and HHS jointly released draft regulations for tribal comment, and in January and February of 1990, thirteen regional consultation meetings were held to discuss the joint draft.

In March 1990, the Coordination Working Group ("CWG") was created to revise the December 1989 joint draft regulations. The CWG, which was composed of representatives from DOI, HHS, and tribes, met periodically between March 1990 and August 1990. In September 1990, a second draft regulation was released reflecting changes made by the CWG.

Throughout the following year, DOI and HHS conducted preliminary reviews of the CWG draft. DOI created a Departmental Review Team, composed of representatives from all DOI bureaus with an interest in the regulation, to examine the draft. DOI also created a Departmental Policy Group, composed of all Assistant Secretaries and the Solicitor, to resolve issues that could not be resolved by the Departmental Review Team. Tribal representatives were not included in this process.

In November 1991, DOI and HHS separately released revised draft regulations based upon their respective reviews of the CWG draft. A joint negotiation team was appointed to resolve differences between DOI and HHS drafts, and this team met for the first time in June 1992. Weekly meetings were held throughout the summer of 1992, and the final joint regulations were completed in October 1992. Tribal representatives also were not included in this process.

In December 1992, the joint draft was submitted to the Office of Management and Budget ("OMB") for review. After the Clinton Administration took office, however, the rule was returned for review by each Department. Thorough reviews were conducted and, on January 20, 1994, the regulations were published in the Federal Register with a 120 day comment period expiring on May 20, 1994.

During this period, three regional meetings (in Phoenix, Minneapolis, and Reno) and one national meeting (in Albuquerque) were held to solicit tribal comments on the proposal. Representatives of many bureaus and offices attended to ensure that tribes were aware that many non-BIA programs are contractible.

During the national meeting, tribes requested that the comment period be extended for 90 days and that a process be developed for tribal participation in the development of the final rule. Specifically, tribes requested six working sessions with DOI, HHS, and 48 tribal members, and that the final rule be published no later than August 31, 1995. DOI agreed in principle to these requests, and DOI and HHS promptly extended the comment period to August 20, 1994, thus providing tribes with seven months to comment on the proposed regulation.

DOI and HHS currently are working to fulfill the other tribal requests made at the national meeting in Albuquerque. Currently, DOI and HHS are developing a charter, under the Federal Advisory Committee Act, to permit us to continue working with tribes after the close of the comment period to develop consensus positions for the final rule. It is anticipated that these efforts will produce a final rule that fulfills the mandates of the 1988 amendments and meets tribal concerns.

Moreover, DOI is working to ensure that, in light of the government-to-government relationship with tribes, the consensus reached with HHS and tribes reflects the final position of the Department. The process established between 1990 and 1992 allowed DOI and HHS to review and revise the original CWG draft without the benefit of further tribal participation. Under the process currently being developed, however, DOI intends that the final rule will reflect any consensus reached with tribal representatives, thus avoiding the delays that occurred between 1990 and 1992. Moreover, DOI intends to complete the process within the timeframe requested by tribes at the May 1994 national meeting in Albuquerque.

## CONCLUSION

We commend the committee for scheduling this hearing and thank you for the opportunity to testify. This hearing has provided us with another opportunity to listen to all sides and work toward a consensus that will serve the needs of the tribes and the Department. We oppose any legislation that hinders our efforts toward reaching consensus. We have a government-to-government relationship with tribes and we are developing a process to resolve important self-determination issues. This process should be allowed to continue unfettered.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

STATEMENT OF
MICHEL LINCOLN
DEPUTY DIRECTOR
INDIAN HEALTH SERVICE

BEFORE THE
HOUSE SUBCOMMITTEE ON NATIVE AMERICAN AFFAIRS
UNITED STATES HOUSE OF REPRESENTATIVES

JULY 29, 1994

Good Morning,

Mr. Chairman, I am Michel Lincoln, Deputy Director, Indian Health Service (IHS). I'm pleased to be here today to provide you an update on the Indian Self-Determination Act (P.L. 93-638) regulations development process. I am accompanied today by Mr. Richard J. McCloskey, Director of the Division of Legislation and Regulations.

Let me begin by stating that we share your concerns about the need for the most simple, straightforward regulations as possible. We also share the concerns expressed by the Congress and the tribes with respect to the time required to finalize the regulations.

First, with respect to the time involved, we agree it has been an lengthy process. However, to date, we have successfully accomplished a key congressional directive, including a joint Notice of Proposed Rulemaking (NPRM), published January 20, 1994, in the Federal Register with a 120 day comment period. The Department of Health and Human Services (DHHS) and Department of the Interior (DOI) ensured that the NPRM was developed with substantial tribal participation. From 1988 to 1990, over 600 individual tribal representatives were actively involved in drafting proposed regulations provisions many of which are contained in the NPRM.

From 1991 to 1993, joint Secretarial review, negotiation, joint policy decisions and clearance was completed through two Administrations. During this period, the IHS maintained communications, through meetings and correspondence, with tribal representatives on draft regulation revisions as policy decisions were made.

In April and May of this year, the Department of Health and Human Services (DHHS) and the Department of the Interior (DOI) held three regional throughout the U.S. and a national meeting in Albuquerque. The purpose of these meetings was to orient all tribes to the rationale behind final policy decisions reflected in the NPRM, as well as to receive public comments.

In May, over 400 tribal representatives who attended the national meeting presented to Assistant Secretary of Indian Affairs Ada Deer and myself, a tribal leader consensus statement. This statement requested a three month extension to the original comment period. It also contained a detailed schedule of recommended activities related to the NPRM to be undertaken over the following year including a series of tribal/federal meetings to review comments and negotiate a consensus toward developing a final rule. The IHS has agreed to the tribes' request and extended the comment period to August 20. We are working out procedural arrangements with the DOI and the tribes and plan to begin these meetings in October, 1994. Based upon the recommended schedule, final regulations are anticipated to be published in November 1995.

While the proposed regulations are longer than the previous issuance they do represent a more simplified process. In the future, all contract requirements will be contained within these regulations where, formerly, key Federal Acquisition Regulation (FAR) provisions, Agency guidelines, manuals, and policies were incorporated by reference. In many instances, tribes provided specific language and text for DHHS and DOI to incorporate into the proposed regulations.

While regulations should not impose undue burdens, they should promote fairness and consistency in Agency decision-making. These types of procedural requirements, in part, limit or define Agency discretion and contribute to overall length. Examples include:

> a provision imposing on the Secretary important requirements, such as timeframes for making decisions to approve or decline a contract;
>
> a description of the Secretary's obligation to provide technical assistance;
>
> identification of the criteria to be used by the Secretary in making discretionary decisions; e.g. criteria for considering tribal requests for waivers, criteria for approving or disapproving contracts;

**DEPARTMENT OF HEALTH & HUMAN SERVICES** Public Health Service

Indian Health Service
Rockville MD 20857

OCT 6 1994

The Honorable Bill Richardson
Chairman
Subcommittee on Native
  American Affairs
Committee on Natural Resources
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Enclosed is the Indian Health Service's (IHS) response to your August 2 inquiry in followup to the July 29, 1994, oversight hearing on the Indian Self-Determination Act regulations. As you requested, the IHS has responded to those questions specifically directed to, and relevant for, the Agency.

We hope that the enclosed information is helpful to you and your staff. Your interest and effort in these matters is appreciated.

Sincerely yours,

Michael H. Trujillo, M.D., M.P.H.
Assistant Surgeon General
Director

Enclosures

Department of Health and Human Service
Responses to Questions Submitted by the
House Native American Affairs Committee
from the July 29, 1994 Oversight Hearing on the
Indian Self-Determination and Education Assistance Act
Public Law 93-638

To Asst. Sec'y Bonnie Cohen and Dep. Dir. Lincoln:

1. How did the change of Administrations which came about as a result of the 1992 elections affect the regulatory development process.

Answer: Some delays occurred as a result of the change in administration. The new administration ordered a review of all regulatory materials then in process including material previously approved for but not yet published in the Federal Register. The notice of proposal rulemaking (NPRM) for the 1988 amendments to the Indian Self-Determination Act, Public Law (P.L.) 93-638 fell in this category. The Department of Health and Human Services initiated a review and reclearance of the NPRM which was completed on August 2, 1993. During this period, Clinton Administration officials were briefed on the level of involvement by the tribes. Some concerns were voiced regarding the adequacy of outreach to, and participation in the drafting process by tribes and tribal organizations after August 1990 and language to this effect was noted in the preamble. However, the Departments concluded that the "public comment period will provide an adequate opportunity for tribes and tribal organizations to provide comments on the current draft."

2. What are some of the other major reasons that implementation of the 1988 Amendments to the Indian Self-Determination Act have taken so long?

Answer: While the regulations development process has been slow, IHS has implemented most of the major provisions of the Amendments regarding new tribal rights and/or Agency obligations. Examples include formal review of Agency decisions, statutory timeframes for contracting decisions, reduced reporting, funding of contract support costs, and removal of the contracting process from the application of Federal procurement rules.

3. Assistant Secretary Cohen -- Could you please identify any efforts the Department has taken to encourage the development of 638 contracts with Bureaus other than the Bureau of Indian Affairs?

Answer: See Department of Interior response.

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4. Assistant Secretary Cohen -- Can you give us some examples of non-Bureau of Indian Affairs programs which have been contracted by tribes pursuant to the Indian Self-Determination Act?

Answer: See Department of Interior response.

5. You are familiar with the legislation introduced by Senator McCain. The legislation I have introduced is quite similar. Do you not agree that the legislation we have proposed, to streamline the contracting process, is in keeping with Executive Order Number 12861 signed by President Clinton last year requiring each agency to eliminate 50 percent of its internal regulations within 3 years?

Answer: While the legislation would reduce the volume of the NPRM, this would not necessarily represent a more streamlined process. It has been the position of most tribes involved to date that it is better to have prescribed procedures than to have greater Agency discretion. It has also been the preference of these tribes that all contract requirements be contained within the regulation where formerly, Agency guidelines, manuals, and policies were incorporated by reference. In many cases, provisions represented by language and text in the regulation were written by tribes participating in the regulation drafting activities. In other instances, the Agency has provided more simplification than what is required by express statutory provisions. If the regulations are not finalized, many advantages that tribes have anticipated will be lost.

6. Although the agencies have agreed to extend the comment period and to re-negotiate the published notice of proposed rulemaking, the tribes have already negotiated two sets of regulations which the agencies have essentially ignored. What guarantee can the Department and the Service give us that the new round of negotiations will not simply end in the same result?

Answer: The Department of Health and Human Service has agreed to the national tribal consensus request to provide for tribal participation in reviewing comments on the NPRM and developing the Final regulation through the establishment of an Advisory Committee under the Federal Advisory Committee Act (FACA). The Committee, which would include tribal representatives, would work toward consensus recommendations to the Secretary on the Final regulation.

It is important to note that tribal positions were not ignored with respect to the proposed rule implementing the P.L. 93-638 amendments. All were thoroughly considered and throughout the process the Departments sought to retain as much of the advice and perspective provided by tribal representatives as possible. However, there are differences with the positions of some tribes including a number related to principles of equity for all tribes.

Page 3 - To Asst. Sec'y Bonnie Cohen and Dep. Dir. Lincoln:

It is important to clarify that there were no earlier agreed upon regulations. There were a series of work drafts developed during extensive meetings. These drafts contained extensive notes describing differing views of the parties - tribal, IHS and BIA. The last series of meetings resulted in the September 1990 work draft. At that time all parties agreed that what was needed was a proposal to which both Federal agencies agreed and to which the tribes could react. In March 1993 staff of both Departments conducted a joint briefing for the 638 Steering Committee which supported publication of the NPRM as the appropriate mechanism to address the remaining issues. The NPRM was published virtually unchanged in 1994. The reliance on the FACA process is in response to the tribal consensus regarding the preferred method to assure tribal participation.

7. Do you anticipate any problems in meeting the commitments you have made to tribes -- to negotiate a redraft of the proposed regulations -- as set forth in the latest draft charter for the Federal Advisory Committee Act committee?

Answer: We do not anticipate delays beyond the estimated time indicated in the tribal consensus statement. Tribes have been involved in virtually all decisions to date regarding the process schedule. It is assumed that this will continue, and any delay will be with the mutual agreement of all parties.

8. Are you aware of any problems with respect to the funding of the Federal Advisory Committee?

Answer: The IHS has agreed to fund half of the estimated $300,000 cost of the Federal Advisory Committee. The IHS does not have a problem with the funding approach.

9. Could you provide us with an estimated cost to the Departments caused by the failure to complete promulgation of regulations in a timely fashion?

Answer: There were no costs associated with the Departments not promulgating the regulation. Since 1988, the amount of funding under tribal contracts has more than doubled from approximately $200 million to over $500 million for both services and facilities construction in FY 1994. Every effort has been and will continue to be made to more than complete the regulations development in a timely manner.

Page 4 - To Asst. Sec'y Bonnie Cohen and Dep. Dir. Lincoln:

10. Could both Departments please provide the Subcommittee with a list of all Indian Self-Determination Act contracts currently operated within the Department and the Service, which includes the contractor, the contract amount, and when the contractor first entered in a contract with the relevant agency?

Answer: The requested material is being compiled and will be forwarded to you when completed.

Attachment ([illegible])

WRITTEN TESTIMONY

on

# IMPLEMENTATION OF THE INDIAN SELF-DETERMINATION ACT AMENDMENTS OF 1988

Submitted to:

HONORABLE BILL RICHARDSON, CHAIRMAN
SUBCOMMITTEE ON NATIVE AMERICAN AFFAIRS
HOUSE NATURAL RESOURCES COMMITTEE
Room 1522 Longworth House Office Building
Washington DC 20515

by:

**PHILLIP MARTIN, CHIEF**
**MISSISSIPPI BAND OF CHOCTAW INDIANS**
**Box 6010 Choctaw Branch**
**Philadelphia Mississippi 39350**

July 28, 1994

Mr. Chairman, I thank you for inviting me to testify about the experiences of the Mississippi Band of Choctaw Indians, a federally-recognized tribe of some 5,500 members, in the implementation of the Indian Self-Determination Act Amendments of 1988. Actually, this will be quite difficult to do, as the Amendments have not been implemented yet, even though it has been nearly six long years since their enactment by the Congress and approval by the President.

Rather, let me begin with a short discussion of my involvement with the development of the amendments. I was one of several tribal leaders invited by staff members of the (then) Senate Select Committee on Indian Affairs to come to Washington for two meetings to discuss tribal governments' problems with the implementation of the Self-Determination Act. These were good discussions, covering a very broad range of issues connected with tribal contracting of Bureau of Indian Affairs and Indian Health Service programs under P.L. 93-638 -- but let me summarize if I can the general concerns expressed by the tribal leaders. We were concerned overall that over the decade since enactment of P.L. 93-638, the personnel of the two Indian agencies had become familiar enough with the provisions of the law and its regulations that they had discovered or invented a large number of bureaucratic strategies that they could use to thwart the intent of the law -- to delay tribes' requests, to declare certain functions non-contractible, to skewer tribes' desired service levels using the weapon of the tribes' own legitimate and authorized indirect costs rates, and the like.

Working with the Senate Committee, especially Michael Hughes, who was sort of moderating the discussions, we came up with a good collection of suggested changes the aim of which was to bring some fresh air to the contracting situation and give tribes more of an even break when confronted with these two massive bureaucracies. The suggested changes were given statutory wording, and, eventually, were enacted, and signed by the President in 1988.

At that time, I remember, I was very optimistic about the prospects for the passage of the Amendments being another step on the road to tribal self-governance, another incremental change aimed at eventual self-sufficiency and local control of Indian-specific resources. I looked forward to being involved in the process of consultation on regulations to implement the Amendments.

But after a couple of those consultation meetings, the scenario was already clear. The Bureau and the IHS would so befoul the atmosphere, with unnecessary details and complex procedures not even alluded to in the Amendments, the atmosphere in which the regulations would have to be developed, that the process would grind to a halt. It did indeed grind to a halt. After six years, we were finally presented with a set of proposed regulations, supposedly promulgated pursuant to an act designed to simplify the process, that are four times more lengthy than the original regulations were.

Let us take as an example the situation with the FARs. The amendments made clear that 1) most 638 contracts were not be considered procurement contracts, but exempted construction contracts from this consideration, and 2) allowed the appropriate Secretary to waive any non-638 regulations he or she thought suitable to waive. This combination should have given the Bureau and IHS people the opportunity to stick with the spirit of the amendments and come up with strong, though not lengthy, construction contract requirements. Instead, we have page upon page of the Federal Acquisition Regulations keyed to the applicability or the non-applicability of each.

Many tribal leaders wish to give the Bureau and IHS another opportunity to resolve the myriad problems with the proposed regulations. I do not agree. At this point, the regulations can only be looked at or revised in a tainted context, tainted by an underlying attitude that is completely contrary to the spirit of the Amendments, developed in the hothouse atmosphere of those who have switched their calling in life from administering Indian programs to "monitoring" tribal contracts.

What is happening is that the statutes are being superimposed on a preexisting association between tribal governments and federal bureaucrats. This longstanding relationship precludes absolute self-determination because it presents the people at BIA and IHS responsible for seeing to it that self-determination is achieved with an absolute conflict of interest situation. If these people carry out the intent of Congress and move federal resources to the local level, they are cutting their own financial throats, ultimately destroying their own livelihoods.

Over the past 20 years of the Self-Determination Policy, as tribal governments have taken responsibility for more and more federal resources, we should have seen the number of federal employees using or monitoring those resources shrink. In fact, the exact opposite has happened. The bureaucracies are bigger than ever, consuming ever larger amounts of resources designated for Indian people. I believe that this fact alone demonstrates the depth of the conflict of interest in the bureaucracy, a situation in which the only form of workable altruism is that for other BIA and IHS employees, not for the persons for whom the administered services have been designed. The successes of the federal Indian agencies in obfuscation in the implementation of Self-Governance compacts, a mechanism devised by the Congress to address the root causes of these problems, is a striking example of the tenacity of the bureaucracy's unenlightened self-interest.

For this reason, I have become convinced in recent months that the only way around the logjam is for the Congress to enact something similar to Senator McCain's proposed "Indian Self-Determination Contract Reform Act," S. 2036, which prohibits the issuance of regulations.

I have reviewed the experience of the Mississippi Band of Choctaw Indians with regard to our P.L. 100-297 School Grant, which we administer for our 1,400 students in six elementary and one high school on the reservation, a law which contains a prohibition on Interior rulemaking. Our experience has been extremely worthwhile -- we have the local flexibility that a grant provides, we have accountability through overall Bureau monitoring, and, more importantly, through our Single Audit.

I know that the full gamut of Bureau and IHS programming is more complex than the single budget line represented by the BIA school operations costs, and any alternative approach to 638 regultions needs to take this into consideration. But overall, the idea of sovereign tribal governments, most of which in this day and age are modern, efficient institutions with ready access to the expertise that they need, and which have and always have had a government-to-government relationship with the federal government, managing Indian financial resources on their own, with accountability rather than supervision, is an idea whose time has come.

Thank you.

# STATEMENT OF
# EDDIE L. TULLIS, CHAIRMAN
# POARCH BAND OF CREEK INDIANS
# AND
# PRESIDENT, UNITED SOUTH & EASTERN TRIBES, INC.

## ON THE

## INDIAN SELF-DETERMINATION CONTRACT REFORM ACT OF 1994
## S.1410 and S.2036

July 29, 1994

Mr. Chairman, I am very pleased today to have been invited to testify on the administrative progress made on the Notice of Proposed Rulemaking to implement the 1988 Amendments to the Indian Self-Determination Act and to state my views on the legislative intent to combine S.1410 and S.2036.

My name is Eddie Tullis, Chairman of the Poarch Band of Creek Indians located in Atmore, Alabama, and the President of United South and Eastern Tribes, an intertribal organization comprised of 21 federally recognized tribes from Maine to Florida and west to Texas.

I attended the May 1994 National Meeting on the P.L. 93-638 Notice of Proposed Rulemaking held in Albuquerque, New Mexico and had the opportunity to hear and witness the frustration and concerns of many Tribal Leaders from across this great country of ours.

The main issue that was repeatedly stated was that the proposed regulations would impede rather than facilitate the 638 contracting of federal programs and services by Indian Tribes and Nations. Over-riding all issues was the expressed desire of Tribal Leaders to see that the final 638 regulations be implemented in accordance with the intent of Congress expressed in the 1988 Amendments.

It has been six (6) years since the 1988 Amendments were enacted. According to congressional records, there have been at least three (3) oversight hearings to determine "WHY!!!" the required regulations had not been developed and implemented.

In good faith and earnest effort, Congress set forth in the 1988 638 Amendments the assurance of maximum tribal participation in the planning and administration of federal services, programs and activities intended for the benefit of Indian people.

In a Senate Indian Affairs Oversight Hearing on NPRM for 638 in January of this year, it was noted by Committee Chairman Senator Inouye that the BIA and IHS had failed to meet its goal of reducing the federal bureaucracy and ending the federal domination of Indian programs.

Despite the fact that the 638 regulations were supposed to "remove many of the administrative and practical barriers that seem to persist..." under the ACT, the proposed regulations are eighty-three pages long and contains hundreds of new requirements.

There are 28 pages of the NPRM that are devoted to the FAR provisions exclusively.

Tribal Leaders stated that the proposed regulations are now more restrictive than existing regulations and raise new obstacles and burdens that impede the tribal government efforts to fully contract under 638. These impediments prohibit effective tribal self-government that was promised by the 1988 Amendments to 638.

In spite of the many substantial comments and recommendations voiced by Tribal Leaders on the sixteen (16) subparts of 638 NPRM, the one issue that prevailed throughout the National Meetings in Albuquerque was that the regulations in their present form are not acceptable to the tribes.

Major recommendations for change are needed to remove the burdensome and obstructive provisions in the NPRM for 638. Areas of concerns expressed by Tribal Leaders are: Contractibility, Funding, Appeals, Divisibility, Construction and Program Standards, Eligibility, Federal Tort Claims, Indirect Cost and Contract Support.

It must be emphasized very clearly to BIA and IHS that Self-Determination **is not** simply another federal program. It is a government-to-government relationship and that 638 is the mechanism by which Congress and the Federal Government recognizes and maintains the trust responsibility.

Mr. Chairman, while the provisions discussed in S.1410 and S.2036 deserve consideration and support by Tribal Leaders, it must be emphasized that the following vital provisions must be incorporated in the legislative language to ensure tribal stability:

- Tribal participation shall be an integral on-going process of ALL budget planning efforts, at ALL levels of budget development.
- All aspects of budgeting with BIA/IHS shall be consistent with the full spirit and intent of the Indian Self-Determination policy to deal with tribes on a government-to-government basis.
- That Tribal decision-making and priority setting over available resources shall also be an integral part of the budget planning and execution process at ALL levels.

Keeping with the spirit and intent of the 1988 Amendments to 638, Congress should look closely at the recommendations for amendments to 638 that includes adding a new Title to provide instructions to BIA and IHS regarding Tribal Participation in the budget planning process.

The Self-Determination Amendments are submitted with the intent to eliminate unnecessary approvals and processes in favor of streamlining the delivery of budget funds to Tribes and eliminating unnecessary obstacles and burdensome regulations to their use.

It is my hope that you will consider incorporating and institutionalizing the Tribal Budget System principles and components in both BIA and IHS the legislative amendments outlined in Section 8 and in the thirteen (13) guiding principles in Appendix A of the Joint Tribal/BIA/DOI Advisory Task Force's February, 1994 Program Report. The Task Force has pointed that the current budgetary process has not been updated since 1934.

I urge you to implement changes and modifications to 638 that recognizes the need for budget reform, as well as, changes to subparts of NPRM that will ensure the implementation and Congressional intent of the Indian Self-Determination Policy. I urge you to give close attention to the Issue of "Contractibility" in the proposed NPRM. The term program is defined in a exceedingly restrictive manner so that it is limited to "operation of services." The definition is an administrative interpretation by BIA and IHS, not be statute, or the intent of Congress and 638. Why I mention this point is the fact that it is directly tied into the budgetary process.

I support the addition of Title IV, Tribal participation in budget, planning process in its entirety.

I support the spirit and intent of S.1410 and S.2036 to amend the Self-Determination Act which expedites tribal involvement and decision making both in BIA and IHS on budgets formulation and flexibility in program design and use of resources.

In closing, Self-Determination must be viewed as a government-to-government relationship process and not just another federal program unnecessarily bogged down in bureaucratic "red tape" and burdensome regulations.

Thank you.

**THE
NAVAJO
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PETERSON ZAH
PRESIDENT

MARSHALL PLUMMER
VICE PRESIDENT

# TESTIMONY OF
# THE NAVAJO NATION
# BEFORE THE
# HOUSE SUBCOMMITTEE ON NATIVE AMERICAN AFFAIRS
# ON
# THE INDIAN SELF-DETERMINATION ACT REGULATIONS AND THE INDIAN SELF-DETERMINATION ACT AMENDMENTS OF 1994

PRESENTED BY
BRITT E. CLAPHAM, II
SENIOR ASSISTANT ATTORNEY GENERAL
NAVAJO NATION DEPARTMENT OF JUSTICE

JULY 29, 1994

# TESTIMONY OF
# THE NAVAJO NATION
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PRESENTED BY
BRITT E. CLAPHAM, II
SENIOR ASSISTANT ATTORNEY GENERAL
NAVAJO NATION DEPARTMENT OF JUSTICE

JULY 29, 1994

The Navajo Nation appreciates the opportunity to testify before the Subcommittee and the Chairman regarding the Indian Self-Determination Regulations and the Indian Self-Determination Act Amendments of 1994. My name is Britt E. Clapham, II, and I am testifying today on behalf of the Navajo Nation. I am currently the Senior Assistant Attorney General and coordinate Indian Self-Determination Act (ISDA or "Act") activities for the Nation's Department of Justice. I have been involved in the Nation's contracting activities for seven years and have been involved with the development of regulations to implement Public law 100-472 since passage in 1988. From this perspective we have several comments and views on this bill.

I would like to address several topics, first the regulations development process both historically and prospectively; the proposed regulations published on January 20, 1994 by the Secretary of the Interior and the Secretary of the Health and Human Services; and finally the Navajo Nation's view on the need for and support of further legislation to make the Indian Self-Determination Act more consistent with its stated purposes and what the Nation views as Congress' intent.

## Regulation Development

As of now, it has been five years and ten months since Public Law 100-472 was enacted and yet there are no regulations available to implement that Act. When passed in 1988, tribes, the Navajo Nation included, felt that the 1988 Amendments to the Indian Self-Determination Act would correct inequities in the manner federal agencies dealt with tribes, simplify the contract negotiation and operation processes and generally usher in a meaningful government-to-government relationship to ensure services and foster tribal self-determination. Unfortunately, that has not been the case; due to the lack of regulations, tribes now stand somewhere between the pre-amendment Indian Self-Determination Act and what Congress intended when Public Law 100-472 was enacted. The lack of regulations to implement the 1988 Amendments is the central source of this problem: Congress has improved the law, but tribes cannot take advantage of the improvement without corresponding regulations. Agency officials, especially at the Area Office levels, continue to act as though the pre-1988 regulations control the statutory scheme rather than understanding that the regulations must grow out of, and comport with, the laws Congress passes and the President signs.

Within sixty days of passage of Public Law 100-472, tribes began meeting with the agencies and among themselves to address the development of regulations. What followed has been a long and frustrating experience for tribes.

In February and March 1989, two large "Regulation Drafting Workshops" with tribal representation numbering between 250-400 along with officials from the BIA and IHS worked to produce a set of regulations to implement Public Law 100-472. The product, draft regulations, now known as the "Yellow Pages" was circulated in April 1989. Many of us who participated believed we had negotiated the regulations.

From April 1989 through late December 1989 the "Yellow Pages" were reviewed, reworked and revised by federal officials without "active tribal participation" as required by the ISDA.

In December 1989, a revised set of regulations was released by the agencies to Indian Country. It bore little relationship to the "Yellow Pages." During January and February 1990, Area Hearings on this document were held and tribes and tribal organizations severely criticized that draft.

In March and April, 1990, another attempt to fully involve the tribes began as the agencies accepted the fact that the December 1989 draft was inadequate. A group known as the Coordinating Work Group (CWG) was created, comprised of BIA, IHS and tribal representatives along with some departmental representation from both DHHS and DOI.

From April through August, in a series of ten meetings, these regulations were again negotiated. The CWG product was circulated to Indian Country in September 1990. What followed was perhaps the most problematic period of this process. For a period of two years and five months there was only limited tribal involvement. Frequently at these meetings federal officials merely reported. These report meetings did not involve any negotiations in the "refinement" of the regulations as required by the Act and affirmatively expressed in the legislative history. See S. Rep. No. 100-274 at 38.

Then in January 1993, a document, which again bore little relationship to the "CWG Draft" or even the "Yellow Pages" was started through the federal clearance process for the publication of a Joint Notice of Proposed Rulemaking. Since this clearance process coincided with the change of federal Administration, the proposed rules were returned by OMB to the new Secretaries for review and analysis.

In May of 1993, the Senate Committee on Indian Affairs held an oversight hearing on these regulations. At that hearing, BIA and IHS officials testified that these regulations were being given high priority for review, analysis, and clearance. Tribal representatives expressed skepticism and recommended further legislation.

In January of 1994, the Joint Notice of Proposed Rulemaking was published. No significant or meaningful changes in the regulations had occurred from January 1993 to January 1994.

In April and May 1994, regional meetings and a National Meeting were held to provide for tribal input on the published regulations. Tribes and tribal organizations expressed numerous concerns and pointed out how the proposed regulations were inconsistent with the Act, the "Yellow Pages" and the "CWG Draft."

Tribal leaders, made several requests at the National meeting, first to extend the comment period for ninety days; this has been done, with the comment period now ending August 20. Tribal leaders also sought a process of post-comment negotiations on the regulations. That was also agreed to by the agencies.

A Federal Advisory Committee Act process has been pursued for these post-comment negotiations. Recently, tribes were advised that joint funding of the Advisory Committee was prohibited by Appropriations Act provisions. The agencies are seeking approval through the Fiscal Year 1995 Appropriations process, to fund these post-negotiation meetings jointly. We are informed that it is unlikely that meetings will begin before November 1994 and if 3-6 meetings occur it will be well into 1995 before these negotiations conclude. It remains to be seen whether those negotiations will be meaningful. In the past, such negotiations have not been fruitful in many respects. The draft regulations are more problematic than the regulations prior to the 1988 Amendments. Fundamentally the regulatory drafting process to-date has been unsuccessful from a tribal perspective.

## January 1994 - Proposed Regulations

I will address central concerns with the regulations generally here and demonstrate how, when read in concert, these provisions narrow tribal contracting options.

### Program Definition

The definition of program found in Section 900.102 of the regulations is unduly narrow and will likely be used by contracting officials to limit contracts to only service functions performed by the federal agencies. Such a definition is not supported by the Act or the legislative history. By narrowly defining program to be the "operation of services" to the program beneficiaries, these regulations can be used to deny contracts at the Area Office and Headquarters/Central Office levels. Such an approach is inconsistent with the legislative history. The Senate in Senate Report 100-274 states:

> tribes are authorized to contract with the Secretary to operate headquarters, area office, field office, agency and service unit functions, program(s)(sic) or portions of programs.
> S. Rep. No. 100-274 at 23.

This definition of program is then imported to the contractibility section of the regulations.

### Contractibility

The provisions in Section 900.106 which address contractibility create several serious problems. As noted above, the misstated "program" definition is used in Subsection (c) and is underscored by stating that these programs "are generally performed at the reservation level." The definition can be further used to limit functions which may be contracted. This Subsection also includes a provision which, according to the discussion in the preamble of the regulations, is an interpretation of the Appointments Clause of Article II of the Constitution and the line of cases including Buckley v. Valeo, 424 U.S. 1 (1975).

This Subsection makes an attempt to restrict contractibility further by preventing a tribe from contracting those functions which would impair the Secretary's "obligation under the Constitution to ensure the laws are faithfully executed." The preamble argues that the Appointments Clause allows only properly appointed federal officials to exercise a particular function, when that function includes "the exercise of significant authority pursuant to the laws of the United States." Such a provision ignores Congressional authority to delegate functions to tribal governments and federal Indian law decisions which support that authority. See U.S. v. Mazurie, 419 U.S. 544 (1975) and more recently Confederated Tribes of Siletz Indians of Oregon v. U.S. Civ. No. 92-1621-BU(D. Ore. December 22, 1993).

In Subsection (d) there is a non-exclusive list of activities which are deemed to be not contractible due to the inherently federal nature of these activities. While the drafters of this section indicate that they relied on a September 1992 Federal Register publication by the Office of Federal Procurement Policy, which was designed to set forth which federal functions are not contractible through procurement contracts with individuals, the drafters have erred in several particulars. Congress has made it clear that P.L. 93-638 contracts are non-procurement contracts, and are therefore different from virtually all other federal contracts. Second, P.L. 93-638 agreements are not contracts with individuals but with tribal governments or organizations authorized by tribal governments to undertake activities on the government's behalf. Lastly, the drafters have gravely misstated the propositions stated in the September 1992 Federal Register, to the detriment of all P.L. 93-638 contractors.

Functions currently under contract could easily fall within the sweep of these two Subsections, such a result is simply anomalous when Congress enacts laws to simplify and liberalize ISDA contracting. Additionally, the draft provisions of Section 900.106 are also written in a vague fashion which may well be employed to restrict activities already contracted by tribes.

Subsection (h) appears to restrict or prohibit contracts which involve other federal laws such as NEPA and the Endangered Species Act. Rather than a prohibition, a wiser course would be to ensure that in those instances where such laws are applicable, that these legal requirements are adequately addressed and funding is provided for the required activities. Clearly this funding should be available as either a direct cost or a contract support cost to comply with such federal legal requirements.

Program Division

Section 900.107 addresses program division, which is necessary to divide a program, or portion thereof, between one or more tribes and/or between a contracting tribe(s) and the federal agency serving the remaining non-contracting tribe(s). While this section only establishes a process to address this issue, the results of this procedure will be used pursuant to Section 900.207(c) in determining whether to decline a contract. This process appears to be a federally created procedure that has the potential to pit one tribe against another when used in the declination methodology. Such an approach is fundamentally objectionable. Further, during the history of prior ISDA contracting, no such provision has been used and one must inquire why such a provision has now become necessary. Finally, this provision is inconsistent with the process of submitting a proposal to contract because this process requires the party proposing the contract to address aspects beyond its control (e.g. Secretarial budgets, program development, etc.). Any logistical difficulties, like the loss of economies of scale and the like, must be borne by the Secretary as part of the implementation of the policy of Self-Determination. Clearly the Secretary should not interpose those logistical difficulties on tribal contractors while also denying the implementation of the ISDA. In the self-governance setting "short-fall funding" has been used, in part, to solve this agency problem rather than to deny a compact; is not such an approach equally appropriate to ISDA contracts?

## Declination

Section 900.207 addresses the methodology the Secretary must use to decline a contract under the ISDA. As noted above, that process includes factors which are inconsistent with the Act and includes factors which will be discussed below that appear to be designed to further restrict contracting. Among these factors are the manner in which environmental laws are considered, the analysis required on the impact upon non-contracting parties, and the review of management systems internal to the tribes and tribal organizations. Further, the contractibility and funding issues are not even included here but arise as provisions in Section 900.206, to deny contracts. As such, these create threshold issues outside of proper, Congressionally enacted declination criteria, and are therefore inconsistent with the Act and legislative history.

## Subparts D, E & F

These Subparts relate to Financial, Property nd Procurement Management systems respectively. As noted above, the fact that the declination provisions address these and require assurances consistent with the provisions located in these Subparts, create what appear to be "threshold issues" for contracting. This is inconsistent with Congressional intent as set forth in the legislative history to P.L. 100-472. Further, the scope of these Subparts will invade upon the internal operations of tribal governments and, in fact, cause the revision of internal tribal systems in order to receive a contract award. Such factors are inconsistent with the Congressional policy on self-determination announced in Section 3 of the ISDA, and expand the federal domination of Indian programs. These provisions and their use in the declination process are highly objectionable because of infringement on tribal sovereignty.

Conclusion

As outlined above, the regulations as written and proposed in the January 20, 1994 Federal Register Notice of Proposed Rulemaking are inconsistent with the 1988 Amendments to the Act and inhibit, rather than enhance, tribal self-determination through the contracting of federal programs. This fact is especially true when the Sections noted herein are viewed as a whole rather than looking at each section alone.

The Navajo Nation has other specific concerns about particular provisions of the regulations, including but not limited to: Employment and Contracting Preference provisions, the Hearings and Appeals provisions, FTCA and Insurance provisions, the Provisions in Subpart J concerning construction, the section on Retrocession in Subpart K and the impact of standards contained in Subpart N.

The Indian Self-Determination Act Amendments of 1994[1]

The Nation has been informed that the Subcommittee is interested in considering further amendments to the Indian Self-Determination Act which are somewhat similar in nature, scope and purpose to a bill introduced in the Senate and currently under revision, S. 2036 "The Indian Self-Determination Contract Reform Act of 1994." On behalf of the Nation, I testified in support of that bill's central concepts and purpose on June 15, 1994 before the Senate Committee on Indian Affairs. Since then I have, along with others, provided the SCIA staff with additional suggestions on the refinement of S. 2036.

The conceptual framework of such a bill should include the following elements. First and foremost it should simplify and expedite contracting between the United States and tribal government on a government-to-government basis to further self-determination by tribes, without burdensome regulations that seek to limit the Act's and Congress' intent to shift control of Indian programs and services from federal to tribal purview.

The idea of a statutorily created contract form ("model contract") to be employed, along with additional provisions bilaterally negotiated between the tribe(s) and the federal agency, would clearly expedite contracting. The Senate version does this and the Navajo Nation would support such a bill in the House.

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[1] At the time of this writing no bill has yet been introduced in the House of Representatives but I am informed according to staff such an effort is being considered by the Subcommittee.

A limited regulatory structure, tied to negotiated rulemaking with absolute time limits for the promulgation of final rules, further assists the contracting process. The agencies would still be allowed to issue internal regulations but regulations interpreting the statutory scheme should be limited to Federal Tort Claim Act issues; Contract Disputes Act and issues, retrocession of contracts, reassumption of contracts; and a declination administrative appeal processes.

Internal tribal administrative systems should be allowed to operate without being redesigned to meet burdensome federal requirements. Tribal accountability systems, along with annual audits pursuant to the Single Audit Act of 1984, provide sufficient controls for the proper use of funds in the areas of procurement, property and financial management.

A key to the local operation of these programs, services, activities and functions, is to not merely allow for, but to encourage the redesign of contracted activities to meet the needs of a given tribe. Only through responding to the needs of tribal members can these programs assist tribes in attaining the goal of self-determination.

In order to accomplish these concepts, the Act will require further amendments to ensure that current statutory provisions operate in concert with anticipated statutory contract specifications ("model contract"). Such further amendments to Act include, provision for the application of tribal preference laws in the areas of employment, contracting and subcontracting; the creation of a tribal option to pursue contract declinations appeals either through an administrative appeal or by actions in the federal district court, such an approach is consistent with options under the Contract Disputes Act where the option is an administrative appeal or a Federal Court of Claims action.[2]

A further consideration related to contract funding, would be the inclusion of a provision, similar to a current regulation, which would allow a tribe to notify the government that insufficient funds have been provided for full performance of the contract or a function of the contract, and then would relieve the contractor from the duty to perform absent an increase in contract funding. The responsibility for performance must shift to the government once funds are expended if insufficient funds are available to perform fully.

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[2] Once commenced in one forum either the administrative appeal or the courts that process must be completed without resort to the other forum.

Such a bill should also provide, consistent with central principles of federal Indian law that ambiguities be resolved in favor of Indians and Indian tribes, and that contract disputes may, by agreement of the parties, be resolved in tribal court or through mediation processes, as well as the Contract Disputes Act.

Amendment of Sections 102, 105 and 106 of the Act will also be needed to address issues of contractibility (through the declination procedures); proper treatment of construction contracting and the inapplicability of Federal Acquisition Regulations; and finally to address several funding issues which have arisen from the regulations development.

The Navajo Nation, is likely to support such a bill once it is available for review and consideration, provided it contains these concepts and provisions.

Absent such a legislative initiative, the Nation will continue to pursue revision of the regulations through the post-comment negotiations but it is currently of the opinion that such efforts will consume at least another year and a half and more likely two years before regulations are finalized. Since the agencies want to retain the "final word" after any post-comment negotiations, we are not encouraged that this exercise will be significantly different from our prior experiences with the "Yellow Pages" or the "CWG Draft." Because of this, the legislative initiative appears most fruitful to achieve a contracting system that is consistent with the statutory scheme, the intent of Congress and also be meaningful to tribes.

# STATEMENT OF S. BOBO DEAN, ESQ.
# BEFORE
# THE SUBCOMMITTEE ON NATIVE AMERICAN AFFAIRS
# OF THE
# HOUSE COMMITTEE ON NATURAL RESOURCES
# ON THE
# PROPOSED REGULATIONS UNDER THE INDIAN SELF-DETERMINATION ACT

July 29, 1994

Mr. Chairman, my name is S. Bobo Dean. I am a partner in the law firm of Hobbs, Straus Dean & Walker of Washington, D.C. and Portland, Oregon. I appreciate your invitation to testify on the proposed regulations to implement the 1988 Amendments to the Indian Self-Determination & Education Assistance Act. Since 1988 our firm has represented a number of Indian tribes and tribal organizations in connection with the development of the regulations to implement the Indian Self-Determination Amendments of 1988.

I present this testimony on behalf of the Miccosukee Tribe of Indians of Florida, the Menominee Indian Tribe of Wisconsin, the Seminole Tribe of Florida, the Metlakatla Indian Community in Alaska, the Bristol Bay Area Health Corporation (Alaska), the Norton Sound Health Corporation (Alaska), the Maniilaq Association (Alaska). The Seneca Nation of Indians and the Oglala Sioux Tribal Public Safety Commission.

The 1988 Amendments expressly required that the Department of the Interior and the Department of Health & Human Services formulate the regulations with the participation of Indian tribes. The statute also required that the regulations be promulgated within ten months from October 5, 1988. No regulations have been promulgated. The agencies did involve tribal representatives in a series of meetings between November 1988 and September 1990 and developed drafts of the regulations which incorporated significant tribal recommendations.

In particular, tribal and federal representatives meeting at Albuquerque, New Mexico, March 21-24, 1989, developed a draft (the so-called Yellow Draft) which resolved many self-determination issues in a manner acceptable to the tribes. At the time, I believed that little remained to be done to finalize the regulations so as to carry out the changes in the statute.

However, the federal agencies, commencing in mid-1990, shut off further tribal consultation and began developing a new draft which departed from many agreements reached in the tribal consultation process and added much new language apparently intended, not to carry out the amendments made by the Congress, but to address difficulties which the agencies had encountered since 1975 in maintaining their paternalistic hold on federally-funded programs for Indian tribes.

The proposed regulations published in January 1994 are the result of consultation between the two Departments without any significant tribal involvement between August 1990 and the end of 1993. They depart in many significant respects from the recommendations received from tribes and from earlier drafts which reflected tribal input (especially the Yellow Draft). In some areas, the agencies have utilized the opportunity to formulate new regulations as an occasion to eliminate language in the existing self-determination regulations which limit agency authority or otherwise encourage tribal self-determination and further the goals of the Act. They have also added provisions for the obvious purpose of strengthening federal control over tribal government decisions.

We have prepared detailed comments on the regulations which we will be filing on behalf of our clients with the Secretary of the Interior and the Secretary of Health & Human Services today. We have provided your staff with a copy of these comments. These comments demonstrate the pervasiveness throughout the regulations of the agency effort to maintain federal control over tribal programs and to avoid a true government-to-government relationship in which policies, priorities and long and short range goals are set by elected Indian tribal governments, not by the federal bureaucracy. In this testimony we will highlight several of the more serious issues raised by the proposed regulations.

### 1. The Scope of P.L. 93-638 (900.106)

A major tribal concern is the narrowing of the scope of Indian self-determination by language in the proposed regulations under the heading "contractibility". It is instructive to compare the action by Congress on this point with the proposed regulations. Prior to 1988 some tribes had attempted to contract functions performed for them by the Bureau of Indian Affairs or the Indian Health Service at the Area Office or Central Office levels. The response was that P.L. 93-638 does not apply to those levels. See, for example, Indian Self-Determination Advisory No. 2, dated August 2, 1983, which states: "Activities at the Area/Program Office and Headquarters levels which are necessary for the overall management and discharge of IHS managerial responsibilities as a federal agency are not programs or services for the benefit of Indians ... These Area/Program Office and Headquarters

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management activities, therefore, are not contractible under authority of P.L. 93-638."

Congress attempted to address this administrative narrowing of the scope of self-determination by amending the Act to require contracting with tribes to plan, conduct and administer programs, or portions thereof, "for the benefit of Indians because of their status as Indians *without regard to the agency or office of the Department of Health and Human Services or the Department of the Interior within which it is performed*."

In the proposed regulations the agencies have responded by coming up with a different strategy for narrowing the scope of self-determination contracting. For the first time since 1975, the agencies have proposed a complex regulatory definition under which a whole series of hurdles must be overcome before a program can be one "for the benefit of Indians because of their status as Indians." There must be evidence of Congressional intent to benefit Indians (rather than simply the fact that Indians benefit). There must be appropriations in place to support the program (a criterion which would void many self-determination contracts which are routinely negotiated in advance of the fiscal year in which the contract will be performed). Furthermore, the regulations define "program" as "the operation of services". The agencies maintain that this definition limits contracting to activities directly involved in the delivery of services, "which are generally performed at the reservation level" but "may be performed at higher organization levels." 900.106(c).

Thus, the agencies seek to retain the power to refuse to permit tribes to contract for activities performed by them at the Area or Central office levels without declining the proposed contract in the manner prescribed by the statute (in accordance with the statutory declination procedure). This provision ignores the express language of the Act that tribes may contract "to plan, conduct and administer" programs. The scope of this directive surely includes those activities engaged in at levels higher than Indian reservations to plan and administer the programs carried out for the benefit of Indians on reservations and in other Indian communities.

On top of these restrictions the proposed regulations impose another limitation based on a line of cases relating to the separation of powers between the Executive Branch and the Legislative Branch and justify a further narrowing of contracting authority under P.L. 93-638 based on these cases. So far as we can see, none of these cases has the slightest relevance to the question of which functions may be contracted to tribal governments under the statutory directive contained in section 102 of the Act. We have provided the agencies with a legal memorandum on the subject and not received any coherent response. We assume this is because they are well aware that their argument on this point is specious.

Further examination of section 900.106 reveals a host of other conditions and restrictions obviously intended to subvert the Congressional purpose of the Act, in the language of section 2 to end "the prolonged Federal domination of Indian service programs" which "has served to retard rather than enhance the progress of Indian people and their communities." Indeed, § 906.106 reads like instructions for a board game (or a computer game) based on the siege of a medieval castle, with moats and battlements and an occasional drawbridge behind which the federal bureaucrats are prepared to resist any intrusion upon their prerogatives and perquisites.

The extent to which the agencies have gone in these regulations to avoid the impact of the specific amendment in 1988 clarifying that Indian and Alaska Native self-determination extends to functions performed at any "agency or office" of their Departments is remarkable. We understand that this is due, in part, to the reluctance of various bureaus within the Department (other than BIA) to accept the fact that Congress in 1988 extended the scope of P.L. 93-638 to their programs benefitting Indians. Our information is that these agencies, with little previous experience with tribal governments, may have had a disproportionate influence on the development of Interior Department positions in the finalization of the proposed regulations.

## 2. Indian Preference (900.115 and 900.605)

Another example of the urge of the federal bureaucracy to make decisions for tribes which they should make for themselves is the Interior Department's position that the requirement in section 7(b) of the Act to give preference in employment and subcontracting to Indians and Alaska Natives prohibits a preference based on tribal affiliation. Quite obviously, when tribal law requires a preference for tribal members, there can be compliance with both tribal law and section 7(b) by a three-tier preference system (first, tribal members; second, other Indians and Alaska Natives, and third, others, if no qualified Indians of Alaska Natives are available). We have provided Interior with a legal opinion on this issue but have received no indication thus far that it will retreat from its unreasonable position.

3. Appeal Procedures (Subpart H)

Another major flaw in the regulations is the refusal of the IHS to provide a "due process" declination appeal and hearing when a contract proposal is declined because it requests more funding that IHS believes the tribe is entitled to receive. IHS argues that funding levels are determined under section 106, not section 102. That is the case, but whether IHS has correctly calculated the amount to which a tribe is entitled is clearly a matter on which the tribe should be entitled to appeal above the officials who have made the initial calculation. The Act entitles a tribe to notice and an appeal and hearing on "any objection" to a contract proposal which is used as a basis for declination. IHS argues that, in such cases, it is not disapproving the proposal, but actually approving it but at a lower funding level. We do not find this play on words convincing.

Section 102 of the Indian Self-Determination Act mandates that when Interior or HHS receives a tribal proposal, it must either approve the proposal within the statutory time-frames or decline it, provide notice of the grounds for declination, technical assistance to overcome deficiencies, and an appeal and a meaningful due-process hearing on the objections raised to the proposal by the tribe, if requested. In the proposed regulations both BIA and IHS take the position that an objection based on the amount of funding requested in the proposal is not a "declination". We find no justification in the plain language of the Act or in reason or public policy for this distinction. While the Interior appeal regulations do provide a "due process" hearing as a matter of grace, IHS has adamantly refused to do so and allows no review of IHS funding decisions above the level of the IHS Director. We think a right to such a "due process" hearing and an appeal to a disinterested decision-maker when a contract is declined on a funding issue is required for both IHS and Interior by the statute.

4. Construction Contracts

The treatment of construction contracts in Suhpart J is another example of federal over-reaching. This Subpart is clearly designed to enable the federal construction bureaucracy to retain control over the manner in which federally funded construction projects for the benefit of Indians are administered. Essentially, the principle concession to self-determination made in Subpart J is to allow a tribe benefiting from a construction project a right of first refusal to build the project under a host of Federal Acquisition Regulation clauses which usually apply to non-self-determination construction projects.

While it is true that section 105(a) of the Act provides that construction contracts are not automatically exempt from the FARs as are all other self-determination contracts and section 4(j) provides that self-determination contracts, except as provided in the last proviso in section 105(a), are not procurement contracts, these statutory provisions do not (as alleged in the proposed regulations) provide that construction contracts *are* procurement contracts. Under section 105 the Secretary retains the authority to waive any contracting law or regulation (including the FARs) that he determines" are not appropriate for the purposes of the contract involved or inconsistent with the provision of this Act". In a limited way the Secretaries propose to exercise this authority by waiving some of the usual FARs. Many of the required clauses (which the Secretaries have so far refused to waive) included in the Exhibit I to Subpart J do not stand up against the test of appropriateness for a self-determination contract and consistency with the goals and provisions of the Act.

For example, such contracts are required to include a clause permitting termination for convenience of the government without compliance with the statutory reassumption provisions contained in section 109 of the Act. It includes provisions permitting unilateral modification of such contracts, notwithstanding the express statutory prohibition against unilateral modifications. It includes burdensome and inappropriate "Brooks Act" requirements and a series of clauses requiring preferential treatment for various groups and entities. It may well be argued that some of these requirements (for example, preferences for Viet Nam veterans and women-owned businesses) carry out commendable social policies. Their inclusion in the exhibit to Subpart J means that these policies are so important that the decision to apply them must be made by the federal government for tribes, and not by the tribes themselves. Is that consistent with the concept that tribes, as a result of their recognized sovereign governmental status, have the right to make such decisions for themselves?

We request that this Committee urge the agencies to re-think their whole approach to construction under the Indian Self-Determination Act. Under this Act funds should be made available to tribes and duly authorized tribal organizations to build

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schools, hospitals, clinics and other facilities for the benefit of Indians and Alaska Natives in accordance with priorities, goals and objectives established by tribal governments, rather than by the federal construction bureaucracy. We expect that such an approach will reduce the chances that buildings will be constructed in Indian country and in Alaska without reasonable regard to the geographic and climatic conditions at the project site and the felt needs of the communities being served, as has occurred too often in the past.

5. Financial Management

In addition, we wish at this time to bring to the Committee's attention certain deficiencies in Subpart D relating to financial management. The proposed regulations have diminished tribal rights from those previously agreed to in the 1988-1990 consultation in a variety of ways. They have eliminated a requirement that there be "documentation" of financial mismanagement to justify federal review of a tribe's financial management system. They have qualified the previous flat assertion that tribes may use "638" funds to meet matching requirements under other programs. They have made the tribal right to the payment of contract support (which is based on section 106 of the Act) dependent on "the process actually utilized by the Secretary to allocate resources," and the payment of indirect costs shortfall, even when funds are appropriated for the purpose by the Congress, is made optional with the Secretary.

Subpart D also gives the agencies the power to circumvent reassumption requirements of the Act by withholding funds or otherwise modifying payment provisions (in violation of the statutory ban on unilateral modifications) with no notice to the contractor or appeal rights.

Tribal representatives throughout the consultation process argued that the unique relationship between the United States and the Indian tribes and the unique purposes of this Act (to end "the prolonged federal domination of Indian service programs", and to encourage "the development of strong and stable tribal governments") justify the development of certain cost principles specific to self-determination contracts. Their view was that cost principles issued by the Office of Management and Budget for grants to State governments and to private non-profit organizations were not always appropriate for application to the transfer of governmental functions from Interior and HHS to tribal governments. In earlier versions of the regulations, the agencies agreed with this view and included certain cost principles which could be followed by tribal contracts instead of those promulgated in OMB Circulars.

The proposed regulations have retreated from this concession to tribal wishes. They require that tribal governments comply with OMB Circular A-87 and that tribal contractors which are non-profit organizations comply with OMB Circular A-122. Our clients object to this provision on two grounds. They remain convinced that the allowability of costs with respect to certain activities should be different for tribes in order to further self-determination goals.

6. Program Guidelines

Another area in which the agencies have used this chance to re-write the regulations for their own bureaucratic purposes involves the regulatory requirements with respect to agency program guidelines. Since 1975 BIA regulations have provided expressly that inconsistencies between tribal program plans and designs for contract operation of Bureau programs and Bureau Manuals, guidelines, or other procedures that are appropriate to programs or parts of programs operated by the Bureau "are not grounds for declination". 25 C.F.R. § 271.15(d). This provision merely reflects the mandate of the Act that proposals be declined on one of the three statutory grounds (unsatisfactory services to Indians, non-protection of trust resources, or that the proposed program cannot be properly completed or maintained) and that tribes are free to depart from BIA guidelines as long as they satisfy the declination criteria. The burden of proof under the existing regulations is on the Bureau to prove that declination is based on the statutory grounds. 25 C.F.R. 271.15(a).

However, under the proposed regulations (Subpart O) tribal proposals must adhere to all regulations, orders, policies, agency manuals, guidelines, industry standards and personnel qualifications to the extent that they have actually been observed by the federal agency. While the tribe may request a variance, Interior has removed the express language of the existing regulations quoted above that makes crystal clear that non-conformity with agency guidelines does not provide a basis for declining to contract.

In Subpart N, the HHS has introduced a similar approach which narrows the flexibility permitted to tribes in developing contract scopes of work. In consultation with tribes the IHS representatives agreed that a tribal contractor of a hospital or clinic could commit to operate the facility in conformity with the standards of the Joint Commission on the Accreditation of Health Organizations and, if it achieved and maintained JCAHO accreditation, the contract need not include detailed scope of work provisions which have typically been included in such self-determination contracts (or, in the alternative, the contractor could rely on Health Care Finance Administration requirements). The intent was to simplify contract language and use JCAHO or HCFA compliance, where possible, as an alternative to detailed standards to be included in the contract documents.

As these provisions have emerged in Subpart N of the proposed regulations, a tribal proposal must now include an assurance of compliance with JCAHO (or HCFA) standards and the regulations contain no provision for an alternative in case a facility is not accredited or in compliance with such standards. The proposed regulations imply that a program not in compliance with JCAHO or HCFA standards and for which JCAHO or HCFA standards exist can be contracted and that, if a contracted facility falls out of compliance, the contractor would be in default and the IHS might well be entitled to utilize such default as a basis for cancelling the contract and reassuming the operation of the facility. IHS staff have informed us that their intention was to be flexible in applying these provisions. Based on prior experience, we are uncomfortable in relying on such assurances.

## CONCLUSION

In conclusion, we urge that the Congress intervene actively in this process to assure that the goals of the 1988 Amendments are finally achieved. While we are pleased that the agencies have agreed to re-negotiate the regulations under the Federal Advisory Committee Act late this year, our clients cannot, of course, be assured that the bureaucracy will listen more carefully the next time around. Many of the issues and problems which we have identified in the regulations are addressed in the proposed Indian Self-Determination Act Amendments of 1994, H.R. 4842. The enactment of this bill would, in general, be supported in my view by Indian tribes across the country. We are providing the Committee staff with a summary review indicating those provisions of the draft which we are confident would receive broad tribal support. We are confident that 98% of the provisions of the bill fall into this category. While I have not had an opportunity to receive instructions from our clients as to all of the provisions of the draft bill, we should note in particular that a number of our tribal clients have voiced concern (1) that the bill should permit additional contract clauses subject to tribal consent beyond those mandated in statutory language and (2) that the agencies should be permitted (indeed, directed) to issue implementing regulations in areas not fully covered in the statute (at a minimum in such areas as FTCA, contract disputes, and procedures governing declination, reassumption and retrocession). H.R. 4842 does accommodate these concerns.

We appreciate the opportunity to provide these views to the Subcommittee.

Before the
United States House of Representatives
Natural Resources Committee
Subcommittee on Native American Affairs

Oversight Hearing on the
Indian Self-Determination Act

Testimony of Lloyd Benton Miller

Sonosky, Chambers, Sachse & Endreson
Washington, D.C.

Sonosky, Chambers, Sachse, Miller,
Munson & Clocksin
Anchorage, Alaska

July 29, 1994

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July 29, 1994

Good morning Mr. Chairman. My name is Lloyd Miller. For the record, I am a partner in a private, public-interest law firm representing Native American tribal interests throughout the United States from Maine to Alaska. I am deeply honored by the Subcommittee's invitation to testify today on matters related to the Act, and in particular to the urgent need for further legislative reform.

## 1. Introduction.

With specific regard to today's hearing, for the last decade a major focus of my practice has been representing tribes and tribal organizations in matters relating to the Indian Self-Determination and Education Assistance Act of 1975, the cornerstone of the Federal Government's Indian policy for over twenty years. In such matters our firm represents both some of the smallest tribes in the United States and some of the largest tribal contractors in the Nation (including the Yukon Kuskokwim Health Corporation of Alaska, operating a $40 million IHS hospital and regional health care delivery system serving a vast area considerably larger than South Dakota, and three quarters the size of Arizona).

Due largely to the resistance of various federal agencies to the imperatives of the Act, our experience in this arena is unfortunately extensive. Thus, in recent years I and my firm have (1) worked closely with the Committee's staff in the two years of hearings and deliberations which led to the 1988 amendments, (2) authored the National Indian Health Board's 1988 blueprint for development of new regulations, (3) actively participated in several Area meetings in 1988, 1989 and 1990 to explore implementation issues, (4) taken a lead role on our clients' behalf in the 1989 national regulatory drafting workshops (producing an April 1989 joint federal-tribal working draft regulation), (5) prepared master comments on the December 1989 federal draft that rejected most tribal positions, (6) attended virtually every "Coordinating Work Group" meeting convened by the agencies in 1990 and in that process authored countless tribal position papers and legal memoranda (a process which ultimately led to the issuance of a new compromise tribal-federal draft in September 1990), (7) served on the four-member Tribal Negotiating Team (comprised of two tribal chairmen and tribal attorney Britt Clapham of the Navajo Nation) to press forward tribal positions in the period 1990-1992, (8) worked with congressional staff in the development of the 1990 Technical Amendments and in the development of S. 3237 in the last Congress and S. 1410 and S. 2036 in this Congress, and (9) developed a set of master comments on the latest agency regulatory proposals published earlier this year.

It is with this perspective that we come to today's hearing.

## 2. Overview of the Regulatory Process.

As the Subcommittee is well aware, in 1988 Congress enacted a set of comprehensive amendments to the Indian Self-Determination Act. The Amendments were developed to address a wide range of problems that had emerged since the Act was originally passed in 1975 (at the urging of Presidents Johnson and Nixon). At that time it was clear that most of the problems lay not in the language of the original act, but in the narrow and grudging interpretations that been given the Act by the Department of the Interior and the Department of Health and Human Services.

Sadly, history has now repeated itself. Thus, instead of timely promulgating new, simplified and liberal regulations within ten months after the Amendments' passage in 1988 -- as Congress and this Committee expressly instructed in section 107 -- the Departments have for six years endeavored to erect formidable new barriers to the contracting imperatives of the Act.

Two of my colleagues on this morning's panel will be sharing with you in detail the unfortunate experiences tribes have suffered under the 1988 Amendments -- not because of anything Congress did or failed to do at that time -- but because of the entrenched resistance within the Departments of Interior and of Health and Human Services to the mandates of those amendments. These experiences include years and years of delay in promulgating implementing regulations with only cosmetic tribal consultation, culminating last January in a proposed set of regulations that do severe violence both to the government-to-government Federal-Tribal relationship, and to Congress's express intent to liberalize contracting opportunities under the Act.

The regulatory process to date has been a disaster. It has consumed nearly six years, with still another two years before anticipated completion. It has cost tribes hundreds and hundreds of thousands of dollars. It has impeded "638" contracting. It has

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led to massive confusion throughout all levels of the Departments regarding the current state of the law.

It has precluded meaningful and effective tribal participation by soliciting tribal input, but then ignoring it. It has resulted in a document which six years later is hardly worth the paper it is printed on. Worst of all, it has led to a set of proposals which would block "638" contracting, rather than advance it as Congress explicitly intended.

Earlier this year a national meeting of tribes called for the establishment of a federal-tribal advisory committee to review the regulations that have been proposed. The tribes did so because they had no alternative so long as the agencies continued to press forward, and so long as Congress waited before stepping in and taking action. While tribes therefore have little choice but to participate in the new advisory committee process -- and will do so with the utmost good faith -- skepticism throughout Indian country abounds that despite the best intentions of the Assistant Secretary and of the Director of the Indian Health Service, federal positions will not change and the result will be but a repetition of the past.

Given this history, the tribes and tribal organizations we represent strongly endorse the core concepts reflected in H.R. 4842, the new proposed amendments to the Act introduced earlier this week by the Chairman and Vice Chairman and now pending before the Subcommittee -- that is: (1) amend the statute to definitively address all the critical contracting issues that have arisen in the course of the past six years, and (2) eliminate the regulatory process altogether, save for a few key exceptions.

In this manner Congress once and for all will have spoken clearly and in detail -- and without possibility of further agency misinterpretation -- to all of the essential issues which have plagued implementation of the 1988 Amendments. Further, in so doing Congress will be able to resolve many of the conflicting interpretations which have emerged over the years among the various agencies charged with administering the Act. And finally, by enacting new amendments Congress will be able to put into place several provisions whose absence even the agencies will agree have impeded full and effective implementation of the Act.

Before discussing H.R. 4842, I would like to address in greater detail the regulatory process.

### 3. The lack of tribal participation in the regulatory process.

Mr. Chairman, as we look back over the past six years we are reminded of how poorly the regulatory process has been going, a process that has hardly reflected the sort of "active [tribal] participation" the Congress anticipated when it directed "the Secretary of the Interior and the Secretary of Health and Human Services to work closely with tribes in the initial drafting of these regulations, as well as in the subsequent refinement of proposed rules for publication." S. Rep. No. 100-274 at 38. Rather, after cosmetically indulging the emphatic demands of tribal representatives and the insistence of this Committee and of the Senate Indian Affairs Committee that tribes be involved in the regulatory process, ***from August 1990 until the present -- nearly four years -- virtually no meaningful tribal participation has been permitted.*** Instead the Departments, working behind closed doors, have at a snail's pace developed a vast set of proposed regulations which seek to inhibit, complicate and burden tribal contracting under the Act, rather than encourage and simplify those activities. Only in the last two months have the agencies indicated a willingness to embrace at least an "advisory" process for increasing tribal participation, a development which comes six years late and is likely to consume yet another two years before final promulgation.

Whether the end result will be improved regulations remains to be seen. In this regard we note that twice already the agencies have rejected the critical elements of tribally negotiated drafts, once in 1989 when the so-called "Yellow Draft" was rejected, and again in January of this year when the Departments rejected the 1990 joint tribal-federal draft. This history gives little cause for optimism.

### 4. Departmental delays in promulgating regulations.

The bureaucratic delays experienced in the regulatory process have been nothing less than outrageous. Initially, BIA and IHS were reluctant to work together at all. Not until eleven months after enactment of the 1988 Amendments -- and one month after the final regulations were to have been promulgated under Congress's original schedule -- did the two agencies finally co-sign a letter formally committing to work together in the development of joint regulations.

Even after the BIA and IHS rejected the negotiated April 1989 tribal-federal draft and produced their own draft later that year, the federal draft lacked any endorsement from other Interior Department agencies. Six months of subsequent meetings with the tribal-agency Coordinating Work Group proved to be as much a setting for the airing of disputes among BIA's sister agencies (BLM, MMS, F&W and BOR) as it was a setting for negotiations with tribes.

Not until December 1990 -- over two years after enactment of the 1988 Amendments -- did former Secretary of the Interior Manuel Lujan finally issue a directive to all Interior bureaus and agencies to join together in developing new implementing regulations. Then, another year passed before each Department issued not a new draft, but two separate versions of implementing regulations. Thereafter it would be yet another full year before informal issuance of a single draft at the beginning of this Administration,

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and incredibly one more additional year until its publication in the *Federal Register* last January.

Even today, we cannot see the light at the end of the regulatory tunnel. As I noted earlier, presently we are in the regulatory comment period which expires in August. Thereafter a new Tribal-Federal Advisory Committee apparently will begin meeting to review the proposed regulation and the comments generated on the regulation (although Interior has now identified legal impediments to funding this process which will require congressional action. meetings are currently anticipated to begin in January and may last six months). Also, the agencies will take some number of months to thoroughly review and respond to the comments received on the proposed regulation, as required by the Administrative Procedure Act.

The Secretaries will have to consider the recommendations of the Advisory Committee. Ultimately the final regulation will have to be cleared through the two Departments and through the Office of Management and Budget, after which this Committee will have one last thirty-day oversight opportunity before final promulgation. In sum, *final publication of regulations implementing the 1988 Amendments is likely two years away.* In the meantime, BIA Agency, IHS Service Unit and other line officials continue to operate largely as if the 1988 Amendments had never been enacted.

At the end of the process, a good eight years will have been consumed by the agencies in developing hundreds of pages of regulations that severely limit and undermine 638 contracting. Particularly given the intent in 1988 to *simplify* the 638 contracting process, it is difficult to attribute any other cause for both these delays and the content of the regulations than an intense and entrenched resistance in the departments' mid-level career bureaucracy to the reforms mandated by Congress.

The time for further legislative reform has come. If this were not clear enough from the past six years, it is abundantly clear from the content of the 1994 proposed regulation.

### B. Overview of the January 1993 Proposed Regulation Published at 59 Fed. Reg. 3166-3280 (January 20, 1994)

In 1988 the Subcommittee's sister committee in Senate directed that "***the regulations regarding contracts under the Indian Self-Determination Act should be relatively simple, straight-forward, and free of unnecessary requirements [or] procedures.***" S. Rep. No. 100-274 at 38. In defiance of that directive, what has emerged is a several hundred page document that seeks to control virtually every aspect of the "638" contracting process. It is, indeed, an ironic development: In 1988 Congress moved aggressively to liberalize the "638" contracting process in favor of tribes. In response, and with the opportunity to write new regulations, both Departments have instead done their level best to produce regulations which restrict and impede contracting. It is not an exaggeration to say they have defied the will of Congress.

I have separately furnished the Subcommittee's majority and minority staff with a copy of a comprehensive Commentary detailing the many deficiencies which permeate the January 1994 proposed regulation, deficiencies which deeply undercut Congress' goal of promoting maximum self-determination. As explained at length therein, the proposed regulation unlawfully or improperly:

- removes huge portions of the Departments' Indian programs and functions from the reach of the statute (the "contractibility" issue), both insulating the bureaucracy and driving up tribal needs for contract support costs.
- removes departmental decisions regarding how contractors are funded from the statutory "declination" procedure and from any meaningful appeal process.
- permits the Departments to decline contract proposals which meet the statutory criteria if the Departments anticipate an adverse effect on the Government's services to non-contracting tribes.
- applies the federal procurement system to the BIA roads program, to cadastral survey programs, and to the Housing Improvement Act program.
- prohibits implementation of local tribal member employment preference ordinances.
- removes contractor flexibility to redesign programs, imposing upon tribal contractors all the same program standards and requirements which dictate how the agencies operate.
- establishes an inadequate means of reporting to Congress the shortfalls suffered by tribes in indirect costs and contract support costs.
- denies tribal contractors mandatory access to the same GSA sources of supply (including negotiated airfares) which the agencies are able to access in their direct operation of programs.
- imposes excessive, antiquated, burdensome and unnecessary "acquisition" and "procurement" requirements on tribal contractors engaged in construction activities.

- impedes immediate transfer to tribal contractors of federally-owned property used in a contract, even though the regulations could permit tribal contractors to take title to new property purchased with contract funds.

- impedes the full distribution to tribes of savings realized by the agencies as their programs are transferred to tribal operation.

- continues the policy of not covering all indirect cost shortfalls, including shortfalls caused by the failure of other departmental agencies to pay their full shares of such costs.

- establishes in the Departments the power to unilaterally suspend a contract or withhold contract funds entirely outside the procedural protections of the statutory "reassumption" process.

These, together with scores of other deficiencies, are detailed in our **Commentary** report.

Let me address just one of these issues by way of example, so that the Subcommittee gets a flavor for how far the agencies have departed from Congress' original intent.

**"Contractibility."** No other place in the proposed regulations so clearly demonstrates the unabashed resistance of both Departments to the mandate of the Act -- notwithstanding the 1988 Amendments. In working closely with the House Natural Resources Committee, the Senate Committee made the issue clear, insisting

> [T]hat the Secretary is not to consider any program or portion thereof to be exempt from self-determination contracts. Tribes have the right to contract from BIA Agency functions, IHS Service Unit functions, and BIA and IHS Area Office functions, including program planning and statistical analysis, technical assistance, administrative support, financial management including third party health benefits billing, clinical support, training, contract health services administration, and other program and administrative functions.
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> * * *
>
> The intent of the Committee is that administrative functions of the Indian Health Service are contractible under the Indian Self-Determination Act.

* * *

> Section 102 as amended further authorizes tribes to contract with the Secretary to operate any program, or any portion of any program, without regard to the organizational level that such program is operated within the Department of the Interior or the Department of Health and Human Services. Again, this emphasizes the intent that tribes are authorized to contract with the Secretary to operate headquarters, area office, field office, agency and service unit functions, programs or portions of programs.

S. Rep. No. 100-274 at 23-24.

In marked contrast to the statute and to this explanatory report, the regulation in Section 900.102 defines the term "program" and the concept of "contractibility" -- that is, what programs are contractible under the Act -- so narrowly as to theoretically insulate all higher level departmental functions from the Act. Thus, the term "program" is defined to mean merely "the operation of services," while Section 900.106(c) restricts contracting to "service delivery programs" "generally performed at the reservation level. . . ." By these terms, ***Area Office, Headquarters and even supportive field activities are theoretically rendered virtually exempt from the mandate of the law.***[1]

To further support this restrictive view of the Act, the preamble to the proposed regulation peculiarly advances the fallacious argument that any broader contracting of departmental functions would somehow violate the Appointments Clause of Article II of the Constitution. The draft regulation at Section 900.106(d) goes on to exempt from contracting any "inherently Federal responsibilities involving the exercise of significant authority under the Constitution, and functions integral to the exercise of discretion, judgment, or oversight vested in the Secretary by law or by virtue of the Secretary's trust responsibilities." To a similar effect is subsection (e).

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[1] The proposed regulation invokes the federal government's "trust responsibility" as a barrier to contracting, in direct defiance of the 1988 Amendments. *See* S. Rep. No. 100-274 at 2644. If, indeed, no aspect of the federal government's trust responsibility could be contracted under the Act, there would be nothing left of federal Indian programs to contract at all. By invoking the shield of "trust responsibility" the Secretaries seek to reserve to themselves the sole and virtually unreviewable authority to determine whether or not to approve contracts under the Act.

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These provisions, if applied by their literal terms to all activities of the Department of the Interior and the Indian Health Service, would bar virtually all of the contracting which has taken place since the original 1975 Act was signed into law. These provisions are all the more curious when they come from Departments which have simultaneously been mandated, under Title III of the Act, to simplify contracting even further through the execution of self-governance compacts. ***Recall that the Title III self-governance demonstration project does not expand the scope of what is contractible, but only the discretion which compacting tribes enjoy in reallocating funds within a consolidated funding agreement.*** A more detailed analysis of the "contractibility" section is contained on pages 6-8 of our **Commentary**.

The Departments' approach to what is "contractible" under the Act is more than a matter of mere philosophical or linguistic quibbling. As a practical matter, such language will provide the agencies with an opportunity to insulate the bulk of their higher level operations from "638" contracting. Even at the "services" level the Departments will have the ability to invoke section 900.106 to assert the power to refuse contracts. And, perhaps most importantly, the Departments' approach will insulate from contracting all of the diverse administrative functions which support the delivery of services in the field, resulting in a concomitant substantial increase in the need for additional contract support cost funding from Congress to carry out those functions.

That is, if warehouse, personnel, or financial management functions supporting a field operation are not contractible, funds representing those supportive functions will be retained by the agencies and will not be included in the Section 106(a)(1) contract amount, leading to a higher tribal need for "contract support costs" to perform these functions. It is precisely this sort of approach to contracting which over the past 18 years has led to the maintenance of an ever-growing agency bureaucracy, even as the contracting process has taken over ever larger shares of the Departments' Indian budgets.

**"Divisibility" and other issues.** As itemized earlier, the "contractibility" issue is not the only place where the regulations are deficient. For instance, prior to the 1988 Amendments neither Department ever identified the need to raise "divisibility" as a potential impediment to 638 contracting. Now, with the opportunity to draft new regulations in the face of legislative reform, the agencies have found a novel new way to undercut those very reforms and thereby deny tribes their statutory right to contract. And yet, on this very topic the Departments have developed procedures in the Title III self-governance compacting initiative to protect the interests of non-compacting tribes (such as through the setting aside of "residuals" and the securing of "shortfall" funding). There is no reason in logic, nor any basis in the Act, for either Department to take a contrary position when it comes to contracting under Title I.

To the same effect are the newly asserted authorities to suspend contracts and to suspend contract payments in a process entirely outside the protective "reassumption" process established by Congress in Section 109 of the Act. Congress carefully addressed the issue of tribal accountability by mandating the preparation of annual audit reports pursuant to the Single Agency Audit Act. And, in instances of "gross mismanagement" Congress authorized the agencies to step in and involuntarily "reassume" operation of contracted programs from a tribe. In so doing, Congress carefully provided for due process -- notice and an opportunity for a hearing.

Congress could have -- but chose not to -- permit the agencies to intervene more actively in the administration of tribal programs. Instead, and as noted on page 21 of the Senate Report, it determined that

> the Federal Government should not intervene into the affairs of . . . tribal governments except in instances where civil rights have been violated, or gross negligence or mismanagement of federal funds is indicated, as provided in Section 109 of the Act.

In defiance of this carefully crafted scheme, Section 900.307 of the proposed regulation asserts the new power to immediately suspend a contract upon the curiously vague basis that "the contractor's continued performance would impair the Secretary's ability to discharge his trust responsibility." Similarly, in Section 900.408(e) the Departments now assert the authority to withhold contract funds from tribal contractors in the event the contractor in any way "fails to comply with the terms of the contract including the provisions of these regulations." Here, again, the agencies seek to take control and micro-manage contractors in a manner never envisioned by Congress in 1975, and in a manner deliberately rejected by Congress in 1988.

The time has come to put an end to this regulatory process.

**6. The need for further statutory reform as reflected in H.R. 4842.**

With the foregoing in mind, I would now like to speak briefly to the provisions of sections 2 and 4 of H.R. 4842, introduced by the Chairman and Vice Chairman earlier this week to reform the Indian Self-Determination Act. I will reserve for discussion by my colleague Barbara Karshmer sections 3, 5 and 6 of the bill. As you will hear, we believe these reforms are urgently needed today, before another two years passes.

First, let me speak to the history of sections 2 and 4. These two sections are familiar to the Chairman and to all those involved in "638" contracting. In the main they were originally developed in 1990 when it was rapidly becoming apparent that the agency drafters were bent on undermining the 1988 Amendments and in dragging on interminably the regulatory process. At that time the amendments were warmly endorsed throughout Indian country and by the National Indian Health Board and the National Congress of American Indians. Congress was requested to act.

In response, a small set of technical amendments was made in 1990 in the form of Public Law No. 101-644. However, based upon the Departments' requests that the regulatory process be given more time to work, this Committee and the Senate Select Committee on Indian Affairs deferred any action on the larger set of amendments.

Over the next two years little progress was made in moving the regulatory process forward. Indeed, a negotiated tribal-federal draft regulation produced in 1990 was in most key respects abandoned by the agencies. In light of these developments, Senator Inouye was moved to act late in the last Congress and introduced S. 3237. Although that bill was reported out of the Senate Select Committee on Indian Affairs, Congress adjourned before the bill could be taken up by the House.

That was 1992, when the Departments were assuring the Committees that regulations would be out within a few months. In fact, nothing happened. Accordingly, and at the request of a large number of tribes, NCAI and the National Tribal Leaders Forum, this same package of amendments was reintroduced in this Congress by Senator Inouye as S. 1410. It is those provisions which we now see divided into two parts and reflected in sections 2 and 4 of the bill now pending before this Committee.

I should note here that the Departments are well aware of these provisions. On May 14, 1993 the Senate Committee on Indian Affairs held an oversight hearing on the Indian Self-Determination Act, a hearing at which the Departments testified and at which these proposed amendments were extensively discussed. Several weeks later Senator Inouye formally introduced the amendments as S. 1410. At that time the Departments of Interior and of Health and Human Services were requested to comment on the bill. To date -- a year later -- we are informed they have still failed to do so.

Now let me turn to a discussion of sections 2 and 4 of H.R. 4842.

Section 2(1) deals with tribal contracting of federal Indian construction activities, and is one of three sections which would reform how the Departments deal with Indian tribes in this area. The other sections are section 2(9)(amending section 105(a) of the Act) and section 2(12)(adding new construction contract negotiation procedures in section 105(m) of the Act). We strongly agree that amendments along these lines are absolutely necessary if Congress's goals under the Act are to be realized in the construction arena.

As things now stand, both agencies deal with Indian tribes just like they would an ordinary sole source bidder on a federal project. They forget they are dealing with a parallel branch of government that is accountable to its tribal citizens. They refuse to disclose federal cost estimates. They impose anachronistic federal acquisition regulations that conflict with the Act. They fail to act as partners with tribes, and they fail to respect tribal independence and responsibility.

In the end, they squelch innovation and creativity in an attempt to force tribal contractors to do exactly what the government would do if it were building the project itself. Plainly that is not what Congress had in mind when it authorized tribes to take over the construction of federal facilities on Indian reservations under authority of the Act. We applaud the Chairman and Vice Chairman for proposing reform in this important and growing area of "638" contracting.

We also commend the Subcommittee for considering a reduction in reporting requirements as is proposed in section 2(2) of the bill. The reporting burden on tribal contractors today is crushing. Despite report language and some statutory reform in 1988, the agencies have continued to impose excessive requirements on contractors -- and they have done so without any showing that doing so is necessary to assure that satisfactory services are provided to program recipients.

As an example, one would think that if a tribe was able to secure and maintain accreditation from the Joint Commission on Accreditation of Hospitals (JCAH) or from the Health Care Financing Administration (HCFA), doing so would be enough to assure the IHS that the hospital or clinic is being soundly run. But this is not the case. As a consequence, tribal contractors see their contract support costs driven up to pay for the preparation of often mindless reports that serve no essential tribal purpose.

The Committee's approach to this problem is sound. Reporting requirements would be negotiated between the tribe and the agency. If the tribe resists a reporting requirement that the agency believes is necessary to protect trust resources, assure satisfactory services, or assure completion of the contracted activity, the agency can decline the contract under section 102 of the Act, subject to the tribal right of appeal. We strongly support section 2(2) of the bill.

We also applaud the Subcommittee for considering sections 2(3) and 2(4), dealing with Indian preference issues. The latter provision is particularly noteworthy, for it resolves the ongoing conflict between Interior and the Department of Health and Human Services over the propriety of tribal preference requirements in the context of "638" contracting.

We reserve special praise for the Chairman's and Vice Chairman's proposal to clarify the scope of contracting through section 2(5)'s amendment to section 102(a)(1) of the Act. As the Subcommittee will hear from other witnesses, and as I discussed earlier, the agency drafters have in recent years sought to codify in regulation a very restrictive view of what is contractible under the Act. Most significantly, they have sought to put off-limits their administrative functions that directly or indirectly support contracted programs. In this way, the agencies have managed to retain their enormous bureaucracies while forcing tribes to incur ever larger shortfalls in contract support costs and indirect costs.

Congress should not pay for double administration. When a program goes over to a tribe, so should all the administrative support for that program. Although the 1975 Act and the 1988 Amendments (together with their legislative history) appeared clear on this issue, the bill would finally eliminate any further creative interpretations of the law.

We also support strongly the proposed amendments to section 102(a)(2) of the Act, as set forth in section 2(6) of the bill. These amendments are essential if the agencies are to be compelled to abandon their overly restrictive misinterpretations of the Act. For instance, section 2(6) addresses the "divisibility" issue in a number of respects, an issue which none of the DHHS or Interior agencies ever dreamt up until after the 1988 Amendments. Here, the agencies are now seeking to legitimize in regulation a new reason for refusing to turn over a program to a tribe: that it is too hard to divide up and separate out the tribe's portion of the program.

But interestingly, the Bureau of Indian Affairs *agrees* that "divisibility" is *not* a proper basis for refusing a contract, and that in such situations some way must be found to meet the tribe's statutory rights while protecting the interests of other tribes. Unfortunately, other agencies at Interior, together with the Indian Health Service, believe otherwise. Thus, the bill responds to a very real need for statutory resolution of this conflict.

Along similar lines, Section 2(6) also makes several important clarifications regarding the "declination" process which governs when an agency "declines" a tribe's contract proposal. Regrettably, these changes too are only compelled by a persistence within both departments to narrowly interpret these vital tribal protections. We strongly support section 2(6) of the bill.

We especially praise the Chairman and Vice Chairman for including several sections in the bill which, though technical, are necessary -- and we believe ought not to be controversial -- if contracting activities under the Act are to proceed more efficiently. For instance section 2(10) would clarify the "retrocession" procedures that govern when a tribal program is turned back to the federal government. Section 2(11) would put into place the same regime governing the ownership and administration of property in the "contract" setting as currently applies in the "grant" setting. Section 2(12) would establish

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detailed procedures for dividing programs, for redesigning contracted programs, and for accessing federal airfares and lodging rates. We support these changes, and in our opinion all of these provisions should be welcomed by the agencies as valuable improvements.

We also thank the Chairman and Vice Chairman for including sections 2(13) through 2(19) to address a number of technical funding and related issues which have come up in the course of administering contracts under the Act. Although I will not comment on each of these provisions in detail, suffice it to say that if section 2(13) is enacted, we believe the federal burden to support contracted programs will actually *diminish* as each agency transfers to tribal contractors their fair tribal share of agency administrative funds. Further, we believe that through the strengthened reporting requirements set forth in section 2(14), Congress will be in a considerably better position to monitor overall agency and tribal performance in this area. At the same time, the improved flexibility afforded tribes under section 2(19) of the bill, regarding the expenditure of contract funds, can be expected to reduce tribal administrative costs and thus further enhance funding available for direct services. Finally, we strongly support Section 2(19)'s express prohibition on the agencies' newly-invented authority to "suspend" or "withhold" contract payments in derogation of the important "reassumption" safeguards of the Act.

Finally, let me briefly discuss section 4 of the bill, which both addresses key issues involved in the "reassumption" process (where an agency "reassumes" operation of a contracted activity in the wake of alleged contractor misconduct), and also addresses the administrative and judicial remedies available under section 110 of the Act.

With respect to emergency reassumption, section 4(1) would improve upon the Act by requiring that notices be in writing and served on the contracting tribe (in addition to the tribal organization), and by specifying with greater particularity the findings which must be made before this extraordinary procedure may be invoked (consistent with administrative rulings in this area). Further, the bill specifies the burden of proof which the Secretary must meet in any reassumption proceeding. These are critical statutory improvements which we support and which are generally consistent with the Departments' current practice.

Section 4(2) provides greater detail on the remedies which a district court can award in appropriate circumstances, details which we believe are necessary improvements to eliminate any perceived uncertainties regarding how district court review is to occur. Finally, we support section 4(3) of the bill, which would direct IHS contract appeals away from the Armed Services Board of Contract Appeals and instead over to the Interior Board of Contract Appeals, a body which clearly has far more experience in issues involving federal Indian law and the Indian Self-Determination Act. This, too, is a change which IHS supports.

The Coalition on whose behalf I am testifying today strongly supports and endorses the concepts and content of H.R. 4842. After trying in vain for nearly six years to aggressively work with the two Departments to simplify, facilitate and encourage contracting under the Act, and to do so within the broader framework of tribal sovereignty, independence and self-determination, we find ourselves instead facing a several hundred page, bureaucratic nightmare. While some changes, and hopefully some improvements, may be made at the margins before final regulations are promulgated -- and tribes will continue to vigorously press the two Departments for such improvements -- it is difficult to imagine how after six years, including two years under a new Administration, the mid-level bureaucracy will cede control and permit a more enlightened approach to the regulatory process.

Enough is enough. The agencies have had their chance more than once to demonstrate to Congress their willingness to embrace the principles of self-determination. At least in the context of "638" contracting they have failed to do so. They have defied the will of Congress, and this Committee and the Senate Indian Affairs Committee have made an ample record of this defiance in prior hearings. We agree that it is time to move on. We therefore strongly endorse Chairman Richardson's and Vice Chairman Thomas' proposal to free tribes of the regulatory process and simply declare in legislation what the rules of "638" contracting will be.

We applaud the Subcommittee, and in particular the Chairman and Vice Chairman, for taking a leadership role in monitoring the Interior Department's and the Indian Health Service's very deficient implementation of the 1988 Amendments, and for taking the initiative to propose new legislation to finally bring to an end the uncertainty and barriers which have faced tribes for many years. We are anxious and enthusiastic to work with the Subcommittee during the balance of this session to move this bill through the legislative process as swiftly as possible.

Thank you Mr. Chairman for inviting me to testify on issues relating to implementation of the Indian Self-Determination Act Amendments of 1988. We stand ready to assist you and the Subcommittee in whatever way you feel would be most appropriate.

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BEFORE THE U.S. HOUSE OF REPRESENTATIVES

COMMITTEE ON NATURAL RESOURCES

SUB-COMMITTEE ON NATIVE AMERICAN AFFAIRS

REGARDING H.R.4842

THE INDIAN SELF-DETERMINATION ACT AMENDMENTS OF 1994

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JULY 29, 1994

## TESTIMONY OF BARBARA E. KARSHMER

BEFORE THE HOUSE OF REPRESENTATIVES
COMMITTEE ON NATURAL RESOURCES
SUBCOMMITTEE ON NATIVE AMERICAN AFFAIRS

REGARDING H.R.4842

THE INDIAN SELF-DETERMINATION ACT AMENDMENTS OF 1994

Mr. Chairman and Members of the Committee:

I appreciate the opportunity to appear before you to provide you with comments on H.R. 4842, the Indian Self-Determination Act Amendments of 1994, which has just been introduced and on the January 1994 proposed regulations promulgated by the Secretaries of Interior and Health and Human Services. I am an attorney at law and my firm represents numerous tribes and tribal organizations which are involved in contracting under P.L. 93-638, the Indian Self-Determination and Education Assistance Act, as amended by P.L. 100-472 (hereinafter referred to as "the Act" or "the Indian Self-Determination Act"). I personally have spent the last 19 years representing tribes and tribal organizations. My first practical acquaintance with P.L. 93-638 was in 1975 shortly after the Act became law. During a tribal meeting on a small remote reservation in Riverside County, California, I witnessed a BIA Agency Superintendent address the tribe about the new law. He specifically advised that Self-Determination really meant "termination" of the tribe because all the BIA officials would lose their jobs and there would be no one left to protect the tribes or their interests. Such prophesies of doom, not uncommon at the time, were wholly unwarranted since even bigger bureaucracies developed to administer and monitor Self-Determination Act Contracts.[1] Since 1975, I have advised tribes and tribal organizations on and negotiated innumerable Self-Determination Act contracts, participated in the 1988 Amendment process, participated in the regulation drafting process, and have been an active participant in the most recent legislative efforts in the Senate on S.1410 and S.2036.

Today, I appear on behalf of three California tribal organizations representing approximately thirty tribes and one individual tribal health program in California. Together they have a service population of nearly 40,000 Indians. These tribes and tribal organizations request your assistance in enacting these amendments to the Act so that they may finally obtain the intended benefits of both the Act and its 1988 amendments which have been largely denied to them due to the failure of the Administration to enact regulations. It is on their behalf, and on the behalf of other clients as well, that I have been involved in the regulation drafting process over the last five years. That process has been costly, frustrating, and replete with unfulfilled expectations. Because of my clients' very reasonable frustration with the process and its current results, they request that you quickly pass the Bill which will obviate the need for a large portion of the proposed regulations and will clarify issues important to tribes and tribal organizations who are capable of and are already running their own programs under the Indian Self-Determination Act.

While we do not question the good faith intentions of the various agencies which are currently involved in the process, we believe that bureaucratic inertia and lack of control that agencies will have over tribal programs, coupled with their unjustified lack of faith in the capability of tribes to operate programs on their own, will continue to impede the process for development of regulations. The tribes have found themselves caught between two agencies who serve very different functions and who take divergent views of the law and the extent of their authority under the law in many respects. We believe that the 1994 Amendments which you have proposed will go a long way toward resolving many of the questions which have arisen during the regulation process to date and toward providing clearer direction to the Secretaries and the tribes in regard to Congressional support for Self-Determination and the implementation of the Act.

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[1] For example, in 1975 when the Act was passed, there was only a handful of IHS employees in California (providing sanitation services only) and there was no California Area Office. Today, despite the fact that there are no direct health care services provided by IHS in California and all services are provided by 25 tribal organizations through P.L. 93-638 contracts or by 7 Urban Indian organizations, the IHS California Area Office has nearly 125 employees and a huge budget. What do they do? Only award and monitor contracts, all when the tribes are severely underfunded for the provision of direct health care services.

## I. Comments On The January 1994 Proposed Regulations.

To date, the regulation drafting process has been a dismal failure in that the Department of the Interior and the Department of Health and Human Services have largely ignored tribal input and have promulgated Proposed Regulations which are wholly unacceptable to the Indian tribes. See 59 Federal Register, No. 13, Thursday, January 20, 1994 (hereinafter referred to as Proposed Regulations). Tribes and their representatives participated in countless weeks of drafting sessions over the course of several years during which compromises were reached between the tribes and the federal agencies. Yet when the proposed regulations were published, they bore little, if any, resemblance to the compromises reached during those several years of work. For example, those 1988 amendments were clearly intended to simplify the contracting process and to avoid extensive and unnecessary reporting by tribes to the agencies. The proposed regulations do the opposite. Your Bill is a positive attempt to avoid further years of debate over regulations that will probably never be satisfactory to the tribes and which may never be consistent with the intent of the 1988 amendments to the Indian Self-Determination Act.

In drafting the Proposed Regulations, DOI and DHHS wholly ignored the canon of Indian law that "statutes passed for the benefit of Indian tribes are to be liberally construed in their favor." Instead, the agencies promulgated regulations which are contrary to both the letter and the intent of the law. We will provide just a few examples of the most egregious problems with the Proposed Regulations.

Perhaps most objectionable is that the proposed regulations purport to limit the ability of tribes to contract by providing that tribes can only contract for the "operation of services for tribal members and other eligible beneficiaries." See Proposed Regulations, Section 900.102 (hereinafter referred to as Section 900.___). The Senate Committee Report on the 1988 Amendments was clear, however, that "administrative functions of [the agencies] are contractible under the Indian Self-Determination Act," not just provision of services. See pages 22-23, Committee Report No. 100-27, Senate Select Committee on Indian Affairs, December 22, 1987 (hereinafter referred to as Report). The Report went on to say that

> Tribes have the right to contract for BIA Agency function, IHS Service Unit functions, and BIA and IHS Area Office functions including program planning and statistical analysis, technical assistance, administrative support, financial management including third party health benefits billing, clinical support, training, contract health services administration, and other program and administrative functions.

See Report, Page 23.

Second, in several areas, the Proposed Regulations allow for unilateral Secretarial modification of the contracts with the tribes or tribal organizations. See, e.g., Proposed Regulations, Section 900.304(2), allowing the Secretary to extend a contract for a period of up to one year without the tribe's approval; and Section 900.308(b)(5) allowing a unilateral contract modification by the Secretary. These provisions fly in the face of the clear language of the Act at Section 110(b) (25 U.S.C. Section 450m-1(b)) which states that

> Unless otherwise agreed to by the resolution of an Indian tribe, the Secretary shall not revise or amend a self-determination contract.

Similarly, the Proposed Regulations attempt to make tribes comply with not only the law and regulations, but also "orders, policies, agency manuals, guidelines, industry standards and personnel qualifications." See Proposed Regulations, Section 900.1501. The Act itself, at 25 U.S.C. Section 450k(a), provides that

> all Federal requirements for self-determination contracts and grants under this act shall be promulgated as regulations. . .

Clearly, requiring tribes to comply with all of these unpublished manuals, unspecified "industry standards"[2], policies that may be unwritten and unknown to anyone but the decision makers, and guidelines that may be unobtainable and unspecific is absolutely contrary to very language of the Act itself.

One of the problems with the Proposed Regulations is that, contrary to the stated intent of the Act, the regulations remove the possibility of any flexibility in operating the programs which may be contracted under the Act. Despite language to the contrary in the preamble to the proposed Regulations, the Secretaries appear to be requiring the tribes to take over programs and to run them just as the Secretaries would have done which perpetuates the very paternalism that the Act intended to overcome. They do this by requiring the tribes and tribal organizations to adhere to extensive uniform rules and standards that can only be met by operating a program that is the mirror image of the one which was formerly operated by the Secretary. See, e.g., Section 900.103(b)(3). The experience of tribes in the Self-Governance compacting process under Title III of the Act has clearly demonstrated that tribes can quite capably make decisions about priorities and operate programs as they see appropriate.

Similarly, the program division section of the Proposed Regulations, Section 900.107, is contrary to the law. That section provides that the Secretary may decline to contract with a tribe or tribes based on the effect that such contract would have on another tribe, despite the fact that the Act provides each tribe with the absolute right to contract without the need to consider the desires of other tribes. Not too long ago, a situation arose in California wherein a tribal consortium had been providing health care to the members of all the tribes in southern San Diego County for many years. One very small tribe decided, however, that it did not want to continue to participate with the other eight tribes in the consortium. IHS refused to contract with the remaining eight tribes in the consortium (who wanted to continue to serve about six thousand Indians but not the members of the one tribe which withdrew from the Consortium) saying that the tribes needed to obtain authorizing resolutions from all the tribes in the service area, and they were lacking a resolution from this one tribe of less than one hundred members. The consortium went to federal district court, and the court held, in Southern Indian Health Council v. Bowen (U.S.D.C., Southern District of California), that the Secretary was required to contract with the tribal consortium to provide services for their members, without regard to the needs of the tribe which did not chose to participate or contract, because Section 102 of the Act provides that the Secretary may decline to contract only if the proposal is deficient in that the tribal organization cannot ensure adequate protection of trust resources, the services to be provided will not be satisfactory, or the tribal organization cannot properly complete or maintain a proposed contract.

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[2] Are these written standards? If so, by whom are they established? Does every industry have only one set of standards? How is a tribe to know which set of standards they are expected to meet? How can such nebulous "standards" be complied with or enforced?

Contrary to the law and this federal court decision, the Secretaries now propose, through Section 900.107, to determine whether to decline the proposal based on "the effect the proposed contract will have on the level, scope, and quality of services. . . for those tribes and individuals. . . who would not be served under a contract proposal." This is clearly contrary both to the law itself, which only allows the Secretary to determine whether the proposed services would be satisfactory for the tribes/Indians who will benefit, and contrary to the holding in Southern Indian Health Council v. Bowen.

The provisions of Section 900.304(b)(1) regarding carryover funding are contrary to the law in that they purport to require further justification and authorization for the use of carryover funds. Both Section 8 of the Act itself and the appropriations acts make such justification and authorization unnecessary, yet the Secretaries ignore the clear mandate of Congress and insert contrary and illegal regulatory provisions.

We could go on ad infinitum describing the portions of the regulations which are clearly illegal in that they are contrary to the law that they propose to implement, and we could further describe the many ways in which the regulations thwart the clear intent of Congress to promote Indian Self-Determination and to allow tribes to take over programs and redesign them in ways that are appropriate to tribal needs, but we will not do so at this time. We would be happy to provide further written testimony on these issues at a later date if requested by the Committee. Whether illegal or merely contrary to Congressional intent, many provisions of the proposed regulations are wholly inappropriate in that they reflect the Secretaries' best efforts to stifle and thwart Indian Self-Determination in order to maintain the status quo, to prevent the loss of federal employees' jobs, and to require tribes to operate programs in the exact same way that the federal government has operated them rather than making them more responsive to tribal needs.

Some of our clients believe that they would be better off with the old long-standing regulations to the extent that they have not been superseded by the 1988 Amendments than they would be with the Proposed Regulations. Moreover, our clients believe that the new process for redrafting the regulations through negotiated rule-making means the passage of another two years before regulations are promulgated, and further, they believe that the process may not result in sufficiently significant changes to justify the lengthy and costly process. Therefore, they urge that you rapidly pass the 1994 Amendments to the Indian Self-Determination Act which will provide the tribes with many of the benefits of the law which Congress originally intended in the original Act in 1975 and the 1988 Amendments, far too many of which have been denied to tribes due to erroneous administrative interpretations.

## II. COMMENTS ON THE INDIAN SELF-DETERMINATION ACT AMENDMENTS OF 1994

Your efforts to move beyond the onerous and burdensome regulations which are being proposed by the two departments are to be commended. The tribes and tribal organizations which my firm represents strongly support the 1994 Amendments inasmuch as they will shortcut the proposed regulatory process by one-and-one-half to two years. The 1994 Amendments are extremely valuable to both the tribes and tribal organizations and to the respective Secretaries of HHS and Interior in that they clarify many preexisting sections of the Act and provide for a uniform contract that will be entered into by all tribes, much like the model self-governance compact that has been developed and used for Title III compacting under the Act.

### A. General comments.

- Invaluable are the provisions throughout the Amendments specifying that not only service programs, but instead all programs, activities, functions and services provided by the Secretary, are contractible. These provisions make the amendments consistent with the intent of the Act which the Secretaries have refused to accept as shown in their proposed regulations.

- The provisions which require the Secretary to carry the burden of proof by clear and convincing evidence that a contract proposal should be declined are critical, as is the requirement that decisions on appeals be made a level higher than the level of the agency whose decision is being appealed. These provisions allow for the tribes to be accorded fundamental fairness in the administrative processes.

- Your revisions to Section 105(a) regarding exempting contracts with tribes from general Federal Contracting laws and regulations are critical because they allow tribes to have the flexibility required to operate programs and remove barriers to true self-determination and enhance the ability of tribes to respond to local situations and the needs of their members.

- The revisions to Section 105(d) regarding retrocession provide a much needed process for retrocession or rescission of contracts. The agencies would require a tribe to give one year notice of retrocession even if there were only six months remaining on the contract. Your amendment makes it clear that a tribe cannot be required to continue to operate a program beyond the remaining life of the contract or for one year, whichever is sooner.

- Your amendments to Section 105(h) of the Act regarding administrative division of the program are critical in that they create a sensible process for such division which maximizes the opportunity of tribes to work things out among themselves but does not allow one tribe to thwart another tribe's right to a Self-Determination Act contract. You have specifically addressed the issue discussed above in Southern Indian Health Council v. Bowen

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in a way that is wholly consistent with the law and with the holding therein.

- One of the most valuable amendments you have made is in Section 105(j) where you have clearly stated that tribes have the opportunity to redesign programs, activities, functions and services under the contract. This should eliminate administrative objections to tribes attempting to make these contract functions most effective for the tribes themselves without requiring them to be modeled in the image of those same programs, activities, functions and services that the Secretary might have provided.

- We strongly support the provisions which you have included in the Bill regarding Indian preference being governed by tribal law. The BIA and IHS take opposing viewpoints on this subject, so the bill provisions are extremely important to resolve this dispute and clarify that tribes have the right to apply their own Indian preference laws.

- Without going into detail, we strongly support and endorse all of the amendments which you have made to Section 106 of the Act. These will have the practical effect of making it possible for the tribes to be assured appropriate funding of their contracts and to be able to use the funds for appropriate purposes. Further, these provisions ensure that Congress is advised of the amounts necessary to fund the tribes pursuant to the requirements of the Act, as well as any deficiency of funds.

- Regarding further regulations to implement the Act, our clients support the concept of limiting the areas in which regulations may be enacted to those enumerated areas you have specified in the Bill, due to the problems tribes have encountered with the regulations since 1988. We believe that there is a need for procedural protections to be provided through regulations including those relating to the implementation of the Federal Tort Claims Act. However, the regulations should be kept to a minimum, as you have provided and as intended by the 1988 Amendments to the Act, and those regulations must be consistent with both the letter and intent of the Indian Self-Determination Act. Your provisions regarding the use of negotiated rule-making should create regulations that are consistent with the spirit of the Act and that are workable for tribes and the administration alike.

- We believe that including Section 108 regarding Contract specifications and setting forth the required contract is an excellent idea. The Self-Governance model compact has succeeded in providing a standardized agreement for the tribes involved in the implementation of Title III of the Indian Self-Determination Act, and the same should be done for contracts under the remainder of the Act. The provisions which you have included in Section 108 are sufficiently flexible to meet the needs of both the Administration and the tribes, yet set forth the basic ground rules for contracting. Not only do the contract provisions become standardized, but they also become the law by including them in the Act.

- Your inclusion at Section 108(1)(B) of the canon of interpretation that laws for the benefit of Indians are to be liberally construed in their favor is to be applauded. This sets the tone for the entire contract and will remind those required to administer the contract of this very important and basic principal of Indian law which must be observed in the implementation of the Act and the contract.

- We endorse your giving tribal courts a significant role to play in adjudications under your Bill, and for allowing those tribes which do not have tribal courts the opportunity to utilize alternative tribal adjudicatory bodies. In California (as well as a number of other states), the State was given criminal and limited civil jurisdiction over the reservations in the mid-1950's pursuant to P.L. 83-280. Although there are more than 100 separate Indian Reservations in California, there are only two tribal courts at present. Where there are not tribal courts, the governing body of the tribe normally acts as the adjudicatory body for any disputes, and your recognition of this fact is most beneficial.

- My clients support the idea of a three year contract with an annual funding agreement to implement it. Most important is the fact that in Section 108(2)(C)(ii) you have included a paragraph regarding the limitation of costs. This paragraph is critical to ensure that tribes are not required to provide services beyond the funding amounts which they are provided through the Contract and that the Secretary will continue to have responsibility to provide services for which funding has not been provided. The requirements of Subsection (b)(4) are most helpful because they make the payment options for tribes more flexible and make the Prompt Payment Act applicable to contract funding amounts.

- The records and monitoring provisions found at Subsection (2)(E) are excellent. They ensure that both the tribes and the agencies are protected yet prevent the agencies from conducting excessive monitoring in lieu of being able to require excessive record-keeping. Because these are so similar to the provisions of the proposed regulations, we would anticipate that these should be agreeable to the Administration as well.

- Section 108(2)(F) carries out the original intent of the Act to place tribes and tribal organizations in the same position as those government agencies that would otherwise be carrying out the activities, so that no benefits or cost savings are lost merely by virtue of the contracting of the activity by the tribe. This section as a whole provides important safeguards for tribes so that they can truly stand in the shoes of the government when they are carrying out contracts and receive the same benefits as to property, equipment, etc.

- The provisions for utilizing alternative dispute resolution found in Section 108(2)(J) are an excellent idea. This approach has been endorsed through other federal legislation. The fact that there are a number of different alternatives allows the maximum flexibility to utilize the one most appropriate for the situation requiring resolution.

Although we could continue to analyze and comment on the model contract in Section 108 paragraph by paragraph, let it suffice to say that we believe that it contains all the necessary elements to make it beneficial and workable for both the tribe or tribal organization and the federal agencies involved. We believe that its use will result in the contracting process being simplified, and it will eliminate the opportunity for disputes over onerous contract terms. Your Bill will also ensure that tribes and tribal organizations, wherever located, are treated uniformly.

### II. Specific Recommendations for Changes to the Bill.

We would make the following comments and suggests for specific limited revisions of the Amendments to the Indian Self-Determination Act of 1994:

- Declination. Federal agencies charged with implementing the Act have taken advantage of several provisions of the Self Determination Act -- and the Act's silence in other areas -- to perpetuate federal control of Indian programs, with often disastrous results for Indian programs. In the 1988 Amendments to the Act, Congress narrowed the grounds on which the Secretary could decline a 638 contract proposal [section 210(a)(2)]. Specifically, Congress eliminated the collection of considerations originally listed under the heading "deficient in performance." Most importantly, Congress eliminated from the Secretary's purview the catch-all phrase "other necessary components of contract performance", an amorphous loophole that effectively gave the Secretary carte blanche to dictate program requirements -- and to decline 638 contract proposals -- on an ad hoc and arbitrary basis. In the 1988 Amendments Congress sought to completely close this loophole by expressly requiring that "all Federal requirements for self-determination contracts and grants under this Act shall be promulgated as regulations in conformity with section 552 and 553 of Title 5." [section 207(a)].

Prior to the 1988 Amendments the Indian Health Service had promulgated declination regulations, at 42 C.F.R. § 36.214 et seq. These regulations, which IHS still relies on today in its 638 contracting decisions, are based on the original language of the Act. These regulations incorporate the declination factors that Congress specifically eliminated in the 1988 Amendments, including the overbroad "other necessary components of contract performance" consideration that Congress intended to eliminate through the amendments. As recently as last year IHS invoked these clauses of its regulations to decline a 638 health care contract proposal and to defend such declination on appeal.

Since 1988 litigation over contract declinations has revealed another problem with the statutory declination standards. The existing section 210(a)(2) allows the Secretary to decline a contract proposal if the service to be provided the beneficiaries "will not be satisfactory." Although the outdated IHS regulations discuss declinations, IHS has never promulgated the required definition of the term "not satisfactory." As a result, if IHS does not like a 638 contract proposal, it is able to conjure up an ad hoc and often arbitrary definition of "not satisfactory." Worse, the HHS Departmental Appeals Board has upheld such decisions, on the grounds that "satisfactory" was not defined by Congress, and that IHS knows what is best for the Indians.

The practical importance of this declination loophole to Tribal organizations cannot be overemphasized. A Tribe may be prevented from establishing a 638 program, or IHS may arbitrarily prevent the expansion or renewal of an existing program. In one recent case, ad hoc definition of "not satisfactory" was not found in any IHS regulation, policy, or rule. Yet this ad hoc definition was directly responsible for shutting down a twenty-year-old Indian clinic in Trinity County, California, leaving hundreds of Indians without access to their chosen health care. IHS and the HHS Appeals Board permitted this result based solely on the "personal experiences" and "professional judgments" of IHS staff, admittedly exercised without limitation.[3]

Regrettably, the administrative appeals process cannot be deemed an adequate safeguard against IHS' arbitrary use of the "not satisfactory" language of the Act. IHS has been able to convince administrative law judges and the HHS Departmental Appeals Board that Congress has authorized IHS personnel, based on their admittedly ad hoc, subjective, and unregulated "personal experiences" and "professional judgments", to decline these contracts as "not satisfactory" for reasons not found in any regulation, policy, or rule. One ALJ's utter deference to IHS' paternalism is summed up by his nutshell analysis of the Self Determination Act: "The Act does not require the Secretary to enter into contracts which are not in the best interests of Indians."[4] The HHS Appeals Board rubber stamped this decision.

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[3] CRIHB and Blue Lake v. IHS, Docket No. C-93-013, Decision No. CR273 (June 23, 1993).

A few further amendments to the Act will help prevent recurrences of such arbitrary federal agency decision-making. First, it is necessary to eliminate the Secretary's carte blanche discretion to decide what is or is not "satisfactory." We propose the following language, which retains the Secretaries' power to decline genuinely problematic proposals, but reduces the Secretary's discretion to arbitrarily designate anything it doesn't like as unsatisfactory.

We recommend amending Section 102(a)(2) of the Act to read as follows:

> (2) If so authorized by an Indian tribe under paragraph (1) of this subsection, a tribal organization may submit a proposal for a self-determination contract, or to amend or renew a self-determination contract, to the Secretary for review. Subject to the provisions of subsection 4 hereof, the Secretary shall, within ninety days after receipt of the proposal, approve the proposal and award the contract unless, within sixty days of receipt of the proposal, ~~a specific finding is made that~~ **the Secretary serves on the applicant a specific written finding, citing clear and convincing evidence or controlling legal authority,** that --
>
> (A) the service to be rendered by the tribal organization to the Indian beneficiaries of the particular program or function to be contracted will ~~not be satisfactory~~ **endanger the health, safety, or welfare of the beneficiaries; or** . . .

The purpose for making these changes is to ensure that only proposals that will endanger the health, safety, or welfare of the beneficiaries are subject to declination under this subsection. Moreover, the Secretary must show such detriment by clear and convincing evidence, not merely a preponderance of the evidence as permitted by the HHS Departmental Appeals Board. It is fundamental to the Act that tribes and tribal organizations be trusted to make their own self-determination decisions, and the Secretary must satisfy a high burden of proof before it can deny the tribal organization this statutory right. The amendment also ensures that the Secretary not just approve or decline the proposal within a specified time period, but also award the contract within the ninety day timeframe as provided in your Bill. This will prevent the current agency practice of sometimes sitting on approved proposals without funding them in a timely manner.

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[4] See note 3, supra, Decision No. CR273 at 12.

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- Time limits in Act are Mandatory. Following Section 102(a)(2)(C), a new paragraph should be added:

> **The sixty-day and ninety-day limitations periods of this subsection shall not be altered or extended except upon the voluntary and express written consent of the tribal organization prior to the expiration of the limitations period.**

The importance of this new paragraph is illuminated by at least two recent declination appeals in which IHS argued that it did not need to decline a proposal within 60 days, as required by Section 102(a)(2), because this time limitation was simply a procedural matter that can be ignored under appropriate circumstances. One ALJ has agreed with this position, and another ALJ has the matter under consideration. This amendment is needed to clarify that the prescribed limitations periods are mandatory, and can only be changed by voluntary consent of the tribal organization. This will avoid a multiplicity of administrative law rulings making exceptions to the 60-day and 90-day rules on a case-by-case basis, in contravention of the intent of the Act.

- Right to engage in discovery. We urge Amending Section 102(b)(3) in the following manner:

> (3) provide the tribal organization with a hearing on the record, **with the right to engage in full discovery relevant to any issue raised in the matter,** and the opportunity for appeal on the objections raised, under such rules and regulations as the Secretary may promulgate, subject to the tribe's or tribal organization's option to proceed directly to federal district court as provided in section 110(a).

Requiring a tribal organization to spend a year or more in the administrative appeal process may mean the kiss of death to the program, even if the Tribe ultimately prevails. The time and money expended, and the lack of funding in the interim, are hardships many organizations cannot survive. By allowing a tribal organization to proceed directly to federal court and providing the usual remedies of injunction and mandate, tribal organizations with just complaints are much more likely to obtain timely redress. Also, existing regulations are ambiguous as to the right of the tribal organization to take discovery on a declination appeal. The Appeals Board has denied such discovery, placing tribal organizations at a serious disadvantage when trying to prove agency violations of law and agency policy, and when trying to rebut evidentiary matters. This amendment levels the playing field in both the administrative forum and in federal court.

- Burden of Proof. Amendments should be made to Section 102(e) so that it would read:

> (e) In any hearing or appeal provided under subsection (b)(3), ~~the Secretary shall carry the burden of proof to establish by clear and convincing evidence that the contract proposal should be declined~~, **or in any federal court proceeding provided under section 110, a contract declination may be upheld only if the**

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> **Secretary carries the burden of proving by clear and convincing evidence that the contract proposal could not, after the Secretary provides the required assistance to the tribal organization, overcome the objections stated in the Secretary's declination notice.** Final departmental decisions in all **hearings and appeals** shall be made at a level higher than the level of the agency whose decision under section (b) is being appealed.

Although the legislative history of the Act specifies that Congress intended the Secretaries to "clearly demonstrate" that a proposed contract was properly declined, the HHS Appeals Board has determined that this does not constitute a "clear and convincing evidence" standard of proof. Given the fundamental principles of self-determination at stake in these appeals, it is necessary to specify the exact burden of proof to be carried by the Secretary, and to confirm that Congress demands more of the Secretary than mustering a "preponderance of the evidence." The amendment also specifies that the Secretary must rely solely on those grounds specified in the declination notice, which grounds must be one of those cited in the statute. This is the current law, but IHS frequently argues on appeal new matter that was not incorporated in the declination notice, or never promulgated as a declination criteria, which new matter is often accepted by the Appeals Board. Also, it must be clear that the Secretary bears the burden of proving that the required technical assistance could not overcome the objections to the proposed contract.

- Restriction on regulations. There should be amendments to Section 107(a) which would read as follows:

> Sec. 107(a). General. Except as may be specifically authorized herein and elsewhere in this Act, the Secretary of the Interior and the Secretary of Health and Human Services shall not promulgate any regulation, nor impose any non-regulatory requirement, relating to self-determination contracts **or to the approval, award, or declination of such contracts,** provided however, that the Secretary may . . . .

These changes are necessitated because IHS has argued in declination appeals that this section applies only to contracts, not to proposed contracts, awards, or declinations. This amendment is necessary to assure that the Secretary does not ignore the Act's protections with regard to the latter.

## III. CONCLUSION

In closing, I would like to take the opportunity to again express my gratitude to you, Mr. Chairman and members of the Committee, for inviting me here today to testify before you on this subject which is of immense importance to my firm's clients. I look forward to having the opportunity to work further with your Committee on these Amendments.

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Federal Register
Vol. 58, No. 176
Tuesday, September 14, 1993

# Presidential Documents

Title 3—

The President

Executive Order 12861 of September 11, 1993

## Elimination of One-Half of Executive Branch Internal Regulations

By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 301 of title 3, United States Code, and section 1111 of title 31, United States Code, and to cut 50 percent of the executive branch's internal regulations in order to streamline and improve customer service to the American people, it is hereby ordered as follows:

**Section 1.** *Regulatory Reductions.* Each executive department and agency shall undertake to eliminate not less than 50 percent of its civilian internal management regulations that are not required by law within 3 years of the effective date of this order. An agency internal management regulation, for the purposes of this order, means an agency directive or regulation that pertains to its organization, management, or personnel matters. Reductions in agency internal management regulations shall be concentrated in areas that will result in the greatest improvement in productivity, streamlining of operations, and improvement in customer service.

**Sec. 2.** *Coverage.* This order applies to all executive branch departments and agencies.

**Sec. 3.** *Implementation.* The Director of the Office of Management and Budget shall issue instructions regarding the implementation of this order, including exemptions necessary for the delivery of essential services and compliance with applicable law.

**Sec. 4.** *Independent Agencies.* All independent regulatory commissions and agencies are requested to comply with the provisions of this order.

William J. Clinton

THE WHITE HOUSE,
*September 11, 1993.*

[FR Doc. 93-22849
Filed 9-13-93; 11:35 am]
Billing code 3195-01-P

**Editorial note:** For the President's remarks on signing this Executive order, see issue no. 37 of the *Weekly Compilation of Presidential Documents.*

**Alaska Native Health Board**

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TESTIMONY OF

JOSEPH DEXTER, CHAIRMAN
ALASKA NATIVE HEALTH BOARD

# CONCERNING DEVELOPMENT OF REGULATIONS FOR THE INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT AS AMENDED

SUBMITTED TO

SUBCOMMITTEE ON NATIVE AMERICAN AFFAIRS
OF THE
COMMITTEE ON NATURAL RESOURCES
UNITED STATES HOUSE OF REPRESENTATIVES

JULY 29, 1994

ALEUTIAN/PRIBILOF ISLANDS ASSOCIATION
BRISTOL BAY AREA HEALTH CORPORATION
CHUGACHMIUT
COPPER RIVER NATIVE ASSOCIATION

KODIAK AREA NATIVE ASSOCIATION
MANIILAQ ASSOCIATION
METLAKATLA INDIAN COMMUNITY
NORTH SLOPE BOROUGH HEALTH DEPARTMENT
NORTON SOUND HEALTH CORPORATION

SOUTHCENTRAL FOUNDATION
SOUTHEAST ALASKA REGIONAL HEALTH CORPORATION
TANANA CHIEFS CONFERENCE
YUKON-KUSKOKWIM HEALTH CORPORATION

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U.S. House of Representatives
Committee on Natural Resources
Subcommittee on Native American Affairs
July 29, 1994 hearing:
Indian Self-Determination and Education Assistant Act Regulations

Witness Information:

| | |
|---|---|
| Name: | Joseph Dexter |
| Title: | Chairman, Board of Directors |
| Organization: | Alaska Native Health Board |
| Organization address: | 1345 Rudakof Circle, Suite 206<br>Anchorage AK 99508 |
| Organization telephone: | 907-337-0028 |
| Residence: | P.O. Box 62082, Golovin, AK 99762 |
| Residence Phone: | 907-779-2111 |

Chairman Richardson and Members of the Subcommittee:

My name is Joe Dexter, Chairman of the Alaska Native Health Board. I am from the Chinik Eskimo Community of Golovin, Alaska, and also serve as chairman of the Board of Directors of Norton Sound Health Corporation, a consortium of 20 tribal governments managing an Indian Health Service P.L. 93-638 contract based in Nome, Alaska.

I appreciate this opportunity to present the observations of the Alaska Native Health Board with respect to the regulations currently being developed by the Indian Health Service and the Bureau of Indian Affairs for amendments to the Indian Self-Determination and Education Assistance Act since 1988.

The Alaska Native Health Board and its member regional Alaska Native health organizations have monitored and participated in the development of these regulations since the passage of the major amendments by the Congress in 1988. We are extremely concerned about their implementation because self-determination has been the cornerstone of the development of the Alaska Native health care delivery system. Approximately thirty Alaska tribes and tribal health consortia manage over $150 million annually through Indian Health Service Title I Self-Determination contracts in the state.

Many of our Board members, staff, and legal representatives have spent hundreds of hours and well over $200,000 in ANHB resources over the past six years to ensure that the regulations enacted by these agencies meet the needs of American Indian and Alaska Native tribal governments and tribal health organizations and fulfill the intent of the Congress.

We have maintained personal representation on the Indian Health Service's national advisory committee on the regulations in both face-to-face and teleconference meetings over a five-year period. We have attended all of the national consultation meetings and conferences designed to ascertain tribal concerns and reconcile them with agency concerns. We have provided staff support to the IHS/BIA/tribal technical working group that developed regulations in 1989-1991. We have submitted written comments following each release of draft regulations.

For several years we participated in the Ad Hoc Tribal Committee on the Indian Self-Determination Act Regulations and contributed to an inter-tribal review of the regulations and the process. We have submitted testimony to DHHS officials at the national IHS/tribal consultation meetings, in other congressional committees, at the National Congress of American Indians, and at all other opportunities we have had to advocate for the establishment of these regulations.

For all Alaska Native tribal representatives who have been involved, this has been a long, arduous, and frustrating process. At times the agencies have been highly considerate of tribal comment and willing to consider approaches and compromises that will make these regulations work. However, for the majority of this process the agencies have been disorganized in their internal considerations, non-communicative in their inter-agency relations, inconsistent with the positions and commitments made, and resistant to the full degree of tribal consultation anticipated and expected by Congress and the tribes.

Now that tribal comments have been received in the regional and national consultation meetings this spring, it is essential that these comments be considered in the final promulgation of the regulations. We are not optimistic that the process for this final review will be any more productive from a tribal perspective than has been the case over the past five years.

In their effort to overcome criticism about the lack of tribal participation in recent years, it is our understanding the BIA and IHS are proceeding to form a 48 member committee of tribal representatives to review the comments and participate in the final regulations review. This approach will involve up to six one-week meetings beginning in January 1995.

We feel that using such a large group is not a reasonable approach to resolving the issues at hand. Not withstanding the costs of such meetings, maintaining communications and reaching consensus with this size of a group will be complex if not impossible. It is likely that this approach will only serve to slow down the final review process. The agency's current timetables do not anticipate completion of the regulations for another 18-24 months.

It will be particularly fruitless if such a major endeavor is undertaken without a commitment from the Indian Health Service and the Bureau of Indian Affairs to make significant changes in the regulations to accommodate tribal concerns. We truly hope that such a commitment will be made and acted upon.

At this time, we do not expect the agencies to significantly modify their positions on the critical issues embodied in the regulations. Implementation of the amendments will mean less control by both agencies over tribal affairs and resources. Full implementation also threatens to reduce the overall size of the agencies. Such changes are inherently resisted by federal agencies.

In the interim until the new regulations are officially published, agency contracting officers and project officers are required to work within the framework of the 1976 regulations and the limited revisions that have been authorized since then. While many agency officials are properly attempting to assist tribes in self-determination within the intent of the new amendments and the draft regulations, their ability to make the full benefits available to tribes is limited.

The message that tribes have received from the Departments of Health and Human Services and Interior is that the agencies do not trust the tribes with health services management and seek to delay the impacts of tribal health program assumption as long as possible. This message has caused the Alaska Native community to seek participation in the Title III Tribal Self-Governance Demonstration Project with both departments.

Most of the provisions in the draft Title I regulations that tribes throughout the nation have found unacceptable will likely only be truly resolved through legal challenges or, preferably, through passage of additional amendments to the Act by the Congress which make the intent of Tribal Self-Determination crystal-clear and limit the regulatory prerogative of the agencies. The Alaska Native Health Board encourages the Subcommittee on Native American Affairs to initiate legislation which will include such new amendments.

In 1993, we contributed to the efforts by the Senate Committee on Indian Affairs to propose approximately 25 new amendments which were outlined in S.1410. Our Board fully endorses these provisions. We are also reviewing S.2036 as introduced, which establishes by legislation the terms of a model P.L. 93-638 contract and limits agency regulatory revisions to such an agreement. We will submit specific comments on this bill at the conclusion of our review.

The amendments will address the priority concerns of tribal governments and tribal health providers in such areas as contractibility and divisibility of programs, declinations and appeals, contract support costs, and construction contracting. Unfortunately, the agencies need to be required to remove a variety of barriers they have created in the new regulations.

It is our understanding that the Senate Committee on Indian Affairs is soon to consider legislation that will consolidate the best elements of these two bills. We encourage the Subcommittee on Native American Affairs and the Committee on Natural Resources to promulgate similar legislation for consideration in the House of Representatives.

**RAMAH NAVAJO SCHOOL BOARD, INC.**

P.O. Box 10 • Pine Hill, New Mexico 87357 • (505) 775-3256 • Fax (505) 775-3240

EXECUTIVE DIRECTOR
Bennie Cohoe

July 28, 1994

Honorable Bill Richardson
U.S. Representative
2349 Rayburn House Office Building
Washington, DC 20515-3103

RE: July 29 Oversight Hearing on ISDA Regulations/S.2036

Dear Congressman Richardson:

Relative to the hearing to be held on the Indian Self-Determination Act (ISDA) regulations by the Native American Affairs Subcommittee, I wish to submit the following comments for the record on behalf of the Ramah Navajo School Board, Inc. (RNSB).

In the six year (and still counting) process to draft implementing regulations for the 1988 Amendments to the ISDA, RNSB has contributed thousands of staff hours, and considerable resources, to attendance at national regulation drafting workshops, Tribal-Federal Coordinating Workgroup meetings, and national and regional hearings; we have suggested regulatory language, written tribal position papers, reviewed joint drafts, presented oral testimony, and submitted copious written comments. Despite these efforts, and like efforts on the part of tribal representatives nationally for six years, the Federal agencies have still failed to embrace the spirit and intent of the Act. Despite a change in Administration, career bureaucrats in the agencies continue to stymie attempts by tribes and tribal organizations to reverse the Federal domination and control of programs for Indians through a liberalization of the regulations that is truly reflective of self-determination policy.

It is the RNSB position that the final product of the agencies published as a Notice of Proposed Rule Making (NPRM) in the Federal Register on January 20, 1994, is fatally flawed, and will lead to a worse state of affairs in contracting under the Act than exists with current regulations. While we have agreed to participate in future tribal negotiations with Interior and Health and Human Service to try and reverse regulatory provisions in the NPRM hostile to tribes and self-determination policy, because we must, we hold little hope that the Federal agencies will make the dramatic, even miraculous, turnaround necessary to make the regulations workable.

For that reason we support and have participated in the development of S.2036, the Indian Self-Determination Contract Reform Act of 1994, to date. The perfection of this bill and its merging with the provisions of S.1410, which would further amend the ISDA to provide protections and benefits for tribal contractors consistent with the Act, is currently the most viable alternative to achieve the desired implementation of self-determination policy in the face of an entrenched and recalcitrant bureaucracy. RNSB has a vested interest in the success of this Federal policy as a tool for continued development in this community where virtually no services existed prior to the advent of the Indian self-determination concept in the early 1970s.

We understand that you have introduced a companion bill to S.2036 very recently in the House. We applaud this news and on behalf of RNSB, I would like to personally express our appreciation for your continued attention to this organization's concerns, the concerns of tribes and tribal organizations in New Mexico, and of those nationally as well. We believe you will find consensus for this legislation in New Mexico as well as nationally.

If RNSB can be of any assistance to you in furthering the cause of this bill, please do not hesitate to call upon me. We fully support your efforts in the House in this regard.

Sincerely,

RAMAH NAVAJO SCHOOL BOARD, INC.

For Bennie Cohoe, Executive Director

BC/RN/mc

## III Summary Critique Of Proposed Regulations

### A Contractible Functions

Perhaps a good place to start out in any critique of the proposed Self Determination regulations is the question of what is and is not contractible (see 900.106 of the proposed regulations). While the 1988 amendments and accompanying Senate Report clearly broaden the scope of BIA and IHS functions that can be contracted, the proposed regulations narrow the scope of what will actually be contracted. This grand reversal is achieved through a series of contractibility threshold requirements and a series of functions that are not contractible because they must be carried out by "Officers of the United States".
BIA and IHS justification for reserving to themselves broad discretionary authority to administratively narrow the scope of what can actually be contracted is premised on a series of separation and delegation of powers cases: Buckley v. Valeo, 424 U.S. 1 (1975); Bowsher v Synar, 478 U.S. 713 (1986); Morrison v. Olson, 108 S.Ct. 2597 (1988); and Mistretta v. United States, 107 SCt. 647 (1989). Taken together, the BIA IHS interpretation of these cases and what they wish them to stand for constitutes one of the most contorted constitutional interpretations I could imagine. These cases have nothing at all to do with the Self Determination Act, Indians or contracting with Indians. Instead, these cases address power and delegation authorities between branches of the Federal government.

### B Protection Against Inadequate Funding

A key outcome objective of the 1988 amendments was to shield tribes from "inappropriate administrative reduction [of funding] by Federal agencies" (see Senate Report 100-274, pages 8 and 30). Section 900.114 of the proposed rules takes several steps back from the 1988 amendments.

Particularly objectionable is the language to the effect that when Congress provides additional funding to tribes, the additional amount is "deemed to include contract support costs"

### C Inappropriate Application of Civil Rights Act

In clear violation of the exemption provided in 42 U.S.C. 2000e of the Civil Rights Act, the proposed joint draft imposes these requirements on tribes as "employers" Agencies are not permitted to impose these requirements in the face of a specific exemption. Indian tribes are not under the Fourteenth Amendment of the U.S. Constitution for the purposes of the Civil Rights Act. Instead, Congress intended civil rights issues to be addressed through tribal implementation of the Indian Civil Rights Act and development of tribal court systems in Indian Country.

# STATEMENT OF HENRY FLOOD
# ON BEHALF OF
# THE SAINT REGIS MOHAWK TRIBE
# AND
# THE SELF DETERMINATION INSTITUTE

## I Introduction

Thank you, Mr. Chairman. My name is Henry Flood. I appear before you today on behalf of the Saint Regis Mohawk Tribe located at Hogansburg, NY. I am a Development Specialist with the tribe. I also appear before you in my capacity as President of The Self Determination Institute, a non-profit corporation created to help Native Americans address legal and regulatory problems in Indian Country. My expertise is in Native American affairs and Federal Administrative Law.

Your invitation to present information about the development and promulgation of the Self Determination Regulations implementing the 1988 amendments to the Self Determination Act (25 U.S.C. 450 et seq.) is most appreciated. My testimony will contain technical comments on the proposed Self Determination Regulations issued for comment on January 20, 1994 (see 59 FR 3166-3249) and a clarion call for this sub-committee use its broad legislative powers to re-focus Self Determination policy for a stronger future.

## II Development of the Self Determination Regulations

My allotted time for live testimony does not permit a detailed discussion of the technical problems with the 83 page proposed regulation. However, our legal counsel S Bobo Dean of Hobbs, Straus, Dean and Wilder has performed an extensive review of the proposed regulations. The Saint Regis Mohawk Tribe agrees with the technical analysis conducted by our counsel and we respectfully request that this document be entered into the printed record as an appendix to this testimony.

This is a classic case of implementation going bad. First, it should never have taken six years to develop the Self Determination regulations. Second, the gap between Congressional intent contained in the 1988 amendments to the Self Determination Act and the proposed regulations is enormous. Third, these regulations cumulatively weaken rather than strengthen the benefits that Congress and the tribes are striving to achieve from the Self Determination law. Finally, the passage of precious time and the emergence of Indian Federalism along side of a venerable self determination policy make further Congressional changes essential.

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### D Application Requirements

Sections 900.203 and 205 of the proposed regulations appear to limit tribes in advance to no more than the Secretarial amount plus contract support costs when tribes contemplate entering into a self determination contract. It seems to me that these matters should be negotiated based on mutual information disclosure and a proposal based on sound cost estimates and a proposed scope of services. Circumstances vary widely from tribe to tribe. Some tribes may be able to operate with less than the secretarial amount based on efficiency of operations or a scope of work that is different than what is presently supported by the secretarial amount. Other tribes may require an amount that exceeds the secretarial amount plus contract support costs. The regulations as now written seem to foreclose the projected costs question in advance of a contemplated application.

A related issue is what should be in the proposal. Some proposed contracts will require greater or less detail depending on the scope of the contract undertaking. It is quite possible that the proposal requirements are too extensive and leave too much discretion to BIA and IHS regarding proposal sufficiency.

### E Rebuttable Presumptions In Declination Criteria

Section 900.207 contains a number of presumptions favoring approval of contracts with tribes. Why make these presumptions rebuttable if a tribe can demonstrate through its proposal that it meets the criteria to contract? This seems like a handy way for the right hand to take away what the left hand givith.

### F Financial Management\Allowable Costs

The Saint Regis Mohawk Tribe believes that something more than "reason to believe" is needed before BIA or IHS initiate a special review of a tribe's financial management system. Some type of documentation requirement is needed. Particularly upsetting is the decision of the regulation drafters to back completely away from the previously negotiated exceptions to OMB Circulars A-21, A-87 and A-122. Gone too is the tribal discretion to select which of the circulars it wish to follow depending on the type of program being operated.

Given these circumstances, OMB approval of the exceptions does not seem likely given its preference for uniformity and granting exceptions "sparingly". A better way to handle costs is to develop a set of cost principles exclusively for Indian Tribes and Tribal Organizations.

### G Indirect Costs

Many unfavorable changes have been made to the indirect cost regulations that are several steps backwards from the 1990 understandings. No longer would the indirect cost agreements be negotiated with the Inspector General and then subsequently be accepted by the Secretary. If the proposed rules are adopted as is, indirect cost rates would be negotiated with the Secretary. Indirect cost rates would have to be approved in advance of funding. Apparently, temporary or interim rates are precluded. This is particularly disadvantageous to smaller tribes.

The language on indirect rate shortfall funding now contained in the proposed regulations (see 900.406(d) ) is contrary to the 1988 Self Determination Act amendments and the will of Congress as reflected in the legislative history of the Self Determination amendments.

### H Tribal Procurement Systems and Contract Approvals

The Saint Regis Mohawk Tribe believes that Indian Tribes should have at least the same right as States pursuant to the Common Grant Management Rule to use their own procurement system in lieu of that specified by the BIA or IHS. We believe that IHS and BIA should accept the certification of a tribe that its procurement system is substantially equal to the standards of the Common Rule. Alternatively, a tribe might elect to use a procurement system based on the well known Model Procurement Code and Regulations, or the procurement requirements contained in the Common Rule on Grant Administration.

We also believe that the threshold for agency prior approval for contracts ($25,000 and higher) is too low. The threshold should be $100,000 if a tribe demonstrates through certification or other documentation that it has a sound procurement system.

### I Indian Preference Policies

Once again, the right of tribes to give preference to Indian organizations and Indian-owned Economic Enterprises is not acknowledged in the proposed regulations. The decision to grant or waive Indian preference on a particular procurement should rest with tribes rather than the Federal government. This again points to the need for revised Indian Preference legislation to clarify this important tribal issue and its relationship to Federal policy towards Indian tribes.

J Appeals and Disputes

Meaningful appeals that are both fair and independent of the initial decision maker are a matter of fundamental administrative equity. The proposed rules are deficient here in several respects. IHS funding disputes are limited to whether the funding amount was reached correctly using IHS allocation procedures. A tribe may not request more funds that the Secretary determines to be available. Funding disputes would be handled by a new Contact Funding Appeals Board (FAB) appointed by the IHS Director. Disputes of this importance should be handled elsewhere in DHHS by someone who is truly independent. Although Section 102 of the Self Determination Act requires an "on the record" hearing, the proposed rules regarding financial disputes are contrary to the law. The tribe directs the Subcommittee's attention to pages 29-33 of our counsel's Commentary on the Proposed Regulations Implementing the 1988 Amendments to P.L. 93-638 for additional analysis of the various appeals mechanisms.

I could go on and on but just these ten (10) areas that have been highlighted are ample evidence that the proposed rules are far from satisfactory. They violate both the letter and the spirit of the Self Determination Act. After six long, frustrating years, Indian Country deserves better regulations than these.

**IV Steps To Correct Regulation Deficiencies**

How can we promptly get out of this implementation swamp? I don't have any magic formula but here are a few suggestions to ponder:

A The House and Senate Indian Affairs Committees should seriously consider further amending the Self Determination Act to cure the most serious implementation deficiencies by writing desirable solutions directly into law. This process could be greatly facilitated by having the committees meet with the members of the tribal negotiating team that helped prepare the 1990 "yellow book" draft that previously contained much of what the tribes thought desirable.

B Tribes should send any comments on the proposed Self Determination rules to the Congressional committees as well so that they might be considered as legislative solutions are developed. To facilitate this process, the Saint Regis Mohawk Tribe recommends that the record of this hearing be held open for thirty (30) days to receive additional comments or hearing statements.

Regardless of how the committee might amend the Self Determination Act, some kind of implementing regulations will be needed. The classic problem that always arises with any implementing regulation is simply this: People want more and less at the same time.

The more radically one veers towards less regulation, the closer you get to lack of standards and specificity. The more one veers towards chapter and verse regulation, the closer you come to defeat of both the law and the concept of Self Determination as broadly understood by Indian Country.

C My one suggestion for the joint drafters of this proposed regulation is to focus on the needs of the intended beneficiaries of Self Determination contracting. The needs and rights of tribal governments are paramount. The agency agenda should be viewed as secondary. BIA and IHS should be going as far as possible to encourage tribes to take over and successfully operate as much of the BIA and IHS functions as possible.

## V Refurbishing The Self Determination Concept For The Future

We are accustom to thinking in concepts and categories. Concepts and categories are handy tools that bring order, direction and a measure of certainty to what we do. Philosophers, theologians, lawyers and politicians are especially fond of their concepts and categories.

As we approach the silver anniversary of the modern Self Determination concept let me urge the committee do more than engage in the technical craft of fixing these unsatisfactory regulations through legislation. I believe firmly in the legal doctrines and intended outcomes of Self Determination. But after nearly 25 years of traveling along this path, there have been some major detours along with notable accomplishments. Clearly there are some weeds in the path and some fresh plowing is needed to refurbish the venerable Self Determination concept and re-position the relationship with Congress for the year 2000 and beyond.

In recent years several court decisions have eroded tribal rights in a number of areas. Regulations and regulatory interpretations have whittled down the applied meaning of Self Determination. I believe that this is an appropriate time to re-visit the roots of what Self Determination really means and initiate a new Reformation that will bring a new vitality to the legal doctrines of Self Determination. The emerging Indian Federalism is a good platform upon which this committee might begin to refurbish Self Determination.

Where do we begin and what must be done? While I do not offer definitive answers, I do offer several suggestions as points of departure.

First of all, sovereignty and self-governance must always be the cornerstones of Self Determination policy. It has been 60 years since anyone has rendered a comprehensive official interpretation on the scope of tribal government sovereignty and authority (see 55 Interior Decisions at 14). This decision relates largely to tribes under the Indian Reorganization Act. Non-IRA tribes were not included. As Indian Federalism enters more into discussions between Congress and the tribes, maybe it is time for Congress to do a thorough revision of the IRA Act. I think a new sovereignty and governance charter is needed for Indian Country to replace the aging IRA Acts.

Since Congress possesses "plenary authority" in Indian affairs, Congress should work with the tribes to enhance sovereignty and self-governance authorities so that protection is afforded against Executive Agency and Court decisions that diminish tribal traditions, culture and governance choices.

Congress engaged in a bit of the very concept I am talking about with the passage of the 1991 Civil Rights legislation. Since its landmark passage in 1964, regulatory implementation and court decisions had taken away some of the vitality of this important law. Congress refurbished the 1964 Civil Rights law by extending its coverage to new groups and notably abrogating several court decisions that had narrowed the scope of civil rights protection to minorities over time. Congress should engage in this same process to strengthen tribal sovereignty and self-governance for all Federally recognized tribes.

Examples that quickly come to mind are court decisions that narrowed Indian religious freedoms, planning and zoning authorities or other governance authorities. Congress has done this selectively when it abrogated the Duro v Reina case. A more comprehensive focus is now needed.

By acting soon to re-invigorate tribal sovereignty and governance through new legislation, it will be easier to restore regulatory balance and a client-centered perspective to the Self Determination contracting process. The conceptual models to accomplish this important task are available.

One notable example for fruitful thought is to examine Charlie Wilkensens' Indians, Time and the Law. Written in 1986, it is a masterful interpretation of Indian legal doctrine and offers valuable insights as to how both the past and the present can be used effectively to enhance tribal authority and Self Determination.

This would also be a good time to examine the role of the Administration for Native Americans and their relationship to tribal sovereignty and Self Determination policy. This small agency with a staff of only 28 has recently been re-authorized with a much broader mandate to help Federally recognized and non-recognized tribes and tribal organizations. New to their mandate is environmental protection and mitigation programs, Native American language programs and a broader mandate to help tribes strengthen both sovereignty and governance.

Maybe it is time to extent partial Self Determination Act coverage to ANA so that Federally recognized tribes can receive Self Determination grants and contracts rather than traditional grants from this agency. ANA is also severely understaffed for its mission and needs at least six to eight more people to cope with the new program authorities it now has.

This concludes my testimony. I would be pleased to answer your questions or supplement the record. Thank you.

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July 29, 1994

Ms. Betty J. Penn
Indian Self-Determination
Amendments Regulations Comments
Chief, Regulations Branch
Office of Planning, Evaluation
and Legislation
Indian Health Service
12300 Twinbrook Parkway, Suite 450
Rockville, MD 20852

Dear Ms. Penn:

We submit herewith our comments on the proposed regulations set forth in the Notice of Proposed Rule-Making ("NPRM") published jointly by the Departments of the Interior and Health & Human Services on January 20, 1994. We are submitting these comments on behalf of the following tribes and tribal organizations: the Alamo Navajo School Board, the Bristol Bay Area Health Corporation, the Maniilaq Association, the Menominee Indian Tribe of Wisconsin, the Seneca Nation of Indians, the Norton Sound Health Corporation, the Seminole Tribe of Florida and the Oglala Sioux Public Safety Commission.

We have represented these tribes and tribal organizations in the development of the Indian Self-Determination Regulations since 1988. Our clients are shocked at the degree to which the proposed regulations published in January 1994 fail to reflect tribal recommendations and, in some instances, make changes designed to address federal agency priorities and concerns, rather than carrying out the evident purposes of the underlying statutory provisions -- to end "the prolonged federal domination of Indian service programs that has served to retard rather than enhance the progress of Indian people and their communities."

Our clients are also deeply disturbed at the failure of the agencies to continue after 1990 the consultation with tribal representatives which produced early drafts of the regulations. The proposed regulations in their present form are a complete re-write done behind closed doors by federal bureaucrats. Their purposes are evident from the substantive changes introduced in the final year of the process. The attitudes of many of the federal participants are reflected in the statement of one of them during the consultation process that the purpose of the

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regulations is to create a 'level playing field' between the Indian tribes and federal employees.

These regulations were unanimously determined to be unacceptable by tribal representatives at the May 2-4, 1994 national conference in Albuquerque which demanded that the agencies agree to re-negotiate. Our clients are pleased at the commitments which have now been made by the Secretary of the Interior and the Secretary of Health & Human Services to engage in a thorough re-negotiation of the regulations through the procedures available under the Federal Advisory Committee Act. They look forward to active participation in the negotiation of the final regulations.

As our comments herewith demonstrate, this process can only succeed if the federal representatives come to the process with a wholly new approach -- a determination to develop regulations which strengthen, rather than weaken, tribal authority, place discretion in the hands of tribes and tribal organizations (instead of in the hands of federal bureaucrats) and eliminate burdensome, impractical and unnecessary restrictions on the ability of tribes to serve their members.

We have prepared our comments in the format of a section-by-section review of the NPRM, identifying our concerns with individual draft regulations (if any) and proposed revisions intended to address those concerns. At certain points where more lengthy or detailed analysis or information were deemed necessary, we reference legal memoranda included as attachments to these comments.

In the course of the comments, we note that certain issues require reconsideration through negotiations between tribal representatives and federal representatives. These issues include among others certain financial management topics, appeal procedures and construction contracting. In preparing these comments, we found that negotiated solutions identified in earlier drafts adequately address our clients' concerns. In such cases we have recommended restoration of the previously negotiated language.

We are available to further explain and discuss any of the comments set forth herein. As explained in detail below, the proposed rules, while streamlining self-determination contracting procedures in some respects are, in numerous instances, more restrictive and burdensome than existing regulations. The imposition of new obstacles to tribal contracting under the Act is directly contrary to the intent of Congress in enacting the 1988 Amendments -- the law which the proposed rules must implement. We urge that the Departments of the Interior and Health & Human

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Services work with tribal leaders in a close, creative and understanding manner to remedy deficiencies in the proposed rules as identified in these and other tribal comments.

## SUBPART A - GENERAL

Definitions (900.102)

"Construction" -- Representatives from both the Department of the Interior and Department of Health and Human Services agree that road maintenance and Housing Improvement Programs (HIP) should be exempt from the definition of construction. To date, however, no effort has been made correct this oversight.

***Recommended Revision:***
Replace the final sentence of the definition of construction with the following:

**Construction does not include: (1) the manufacture, production, furnishing, construction, alteration, repair, processing, or assembling of modular buildings, vessels, aircraft, or other kinds of personal property; or (2) contracts (i) limited to providing architectural and engineering services, planning services, and/or construction management services; and (ii) for the Housing Improvement Program, and road maintenance program administered by the Secretary of the Interior; and (iii) for the health facility maintenance and improvement program administered by the Secretary of Health and Human Services.**

"Pass-through funds" (3179) -- The regulation drafters, in the definition of the term "pass-through funds" state that the identification of what constitutes "pass-through funds" under a contract will be limited to those funds which the contractor and the Secretary agree upon or which are so designated in the indirect cost agreement. The September 1990 proposed regulation stated that "pass-through funds" were those funds which the contractor and the cognizant federal agency agree upon and are so designated in the indirect cost agreement.

The proposed revision is subject to significant ambiguity. It may mean that, if the indirect cost agreement does not expressly identify which funds are "pass-through funds", the Secretary retains the right, under the proposed regulations, to negotiate this issue with the contractor. While this is contrary to the present policy which clearly requires that the contractor and the cognizant federal agency negotiate the indirect cost rate and have that rate honored by the DOI or DHHS, it probably would not create too much of a problem since indirect cost agreements do generally identify "pass through" funds excluded from the calculation of the rate. However, the more likely interpretation and intent is that the Secretary (i.e., IHS or BIA) may establish additional categories of pass-through funds subsequent to and inconsistent with the rate negotiations (as IHS has attempted in the past).

As noted in our discussion of indirect costs below, the regulation drafters have omitted language included in the September, 1990 version which required the Secretaries to honor the indirect cost rate, and the direct base, negotiated between the tribal organization and its cognizant federal agency. These changes would permit the agencies to second guess the cognizant agency as to whether so called "pass-through funds" are included in the direct cost base.

At regional and the national conferences held to review the NPRM with tribal representatives, officials of both agencies stated that it was their intent to honor indirect cost rate agreements negotiated between tribal contractors and the cognizant federal agency. The language of the September 1990 draft should be restored in order to implement this federal commitment.

***Recommended Revision:***
Replace the definition of "pass-through funds" as follows:

**"Pass-through funds" means those funds in a contract that do not receive the same degree of administrative effort as do other direct activities performed by a contractor. These funds may include, but are not limited to, subcontracts, capitalized equipment, and capital improvements. They shall be limited to those funds which the contractor and the cognizant federal agency agree to characterize as pass through and are so designated in the indirect cost agreement.**

Program (3179) -- There is no justification, nor authority under P.L. 93-638 as amended, for limiting "program" to the "operation of services" as a means of restricting tribal rights under the Act. See further discussion under § 900.106.

***Recommended Revision:***
Replace the definition of "program" as follows:

**"Program" means any service, program, function or activity of the Department of the Interior or the Department of Health and Human Services and shall include administrative functions including program planning and statistical analysis, technical assistance, administrative**

**support, financial management including third party health benefits billing, clinical support, training, contract health services administration and other administrative functions of the Departments which support the delivery of services to Indians, including those administrative activities related to, but not part of, the service delivery program, which are otherwise contractible, without regard to the organizational level within the Department where such functions are carried out.**

Trust responsibility -- The IHS currently defines the phrase "trust responsibility" to mean "the responsibility assumed by the government by virtue of treaty, statutes and other means legally associated with the role of trustee to recognize, protect and preserve tribal sovereignty and to protect, manage, develop and approve authorized transfers of interests in trust resources held by Indian tribes and Indian individuals to a standard of the highest degree of fiduciary responsibility." 42 CFR 36.204(l).

Current regulations of the BIA read as follows: "Trust responsibility means for the purposes of this part only, to protect, manage, develop and approve authorized transfers of interests in trust resources held by Indian tribes and Indian individuals to a standard of the highest degree of fiduciary responsibility." 25 CFR 271.3(t).

The phrase "trust responsibilities" is referenced in the proposed regulations and there is no justification for this term to be omitted from the definition section of the regulations. We recommend that the definition found in current IHS regulations be included in the revised regulations.

Secretarial Policy (900.103(b)(3)) (3180) -- This provision states that the regulations are designed to facilitate and encourage "Indian tribes to participate in the planning, conduct and administration of those Federal programs serving Indian people" and provide that Indian tribes will be afforded "flexibility". Instead, the regulations should state, as the September 1990 draft regulations provided, that the regulations "shall be interpreted so as to afford Indian tribes ... the flexibility, information and discretion necessary to design contractible programs and services to better meet the needs of their communities." We should note here that, in general, the statement of Secretarial policy is consistent with the goals and purposes of the legislation. However, we find a number of specific provisions of the regulations which appear inconsistent with the policy statement, as well as with the legislation.

***Recommended Revision: 900.103(b)(3):***

**The rules contained herein shall be interpreted to facilitate and encourage Indian tribes to participate in the planning, conduct, and administration of those Federal programs serving Indian people. These regulations shall afford Indian tribes and tribal organizations the flexibility, information, and discretion necessary to design contractible programs to meet the needs of their communities consistent with their diverse demographic, geographic, economic, cultural, social, religious and institutional needs.**

We also recommend deletion of the concluding sentence of 103(b)(3).

Contractibility (900.106) (3180) -- The 1988 amendments to the Act broadened the scope of what was contractible under the Act by providing that an Indian tribe or tribal organization could contract with either DOI or DHHS to administer a program for the benefit of Indians because of their status as Indians without regard to the agency or office of the Departments of Interior or Health and Human Services within which the services are performed. The proposed regulations seek to limit the effect of the 1988 amendments by defining narrowly the phrase "program for the benefit of Indians because of their status as Indians." We consider § 900.106 to be in conflict with § 103(b)(8) of the Act which states that "the Secretary is committed to ... extending the applicability of this policy [of Indian self-determination] to all operational components within the Department."

Section 900.106 sets forth a three-part test to determine if a program or service is for the benefit of Indians. The three criteria are:

a. Primary or Significant Beneficiaries Requirements

1. Does the authorizing statute or legislative history specifically identify Indians as the "primary or significant beneficiaries of the program";

2. Does the appropriation specifically target Indians as the "primary or significant beneficiaries of the program," as evidenced in bill language, committee reports, etc.;

3. Do regulations identify Indians as the "primary or significant recipients of the services" or reflect a departmental intent to benefit Indians?

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This "threshold test" narrows, rather than expands, the scope of contractible programs and services under the Act by requiring that Indians be the "primary" beneficiaries of the program rather than simply an identifiable recipient of a federal program.

b. Appropriations Requirement -- The proposed regulations also provide that in order for a program to be subject to contracting under the Act, it must be one for which Congress has appropriated funds. While the funding of a contract is certainly subject to available appropriations, requiring an appropriation prior to approval of a contract is wholly unnecessary, inconsistent with present practice and inconsistent with section 102 of P.L. 93-638 which directs the Secretary to contract programs without any restriction as to whether funds have been appropriated therefor. 25 U.S.C. § 450f(a). This position is also inconsistent with the legislative history to the 1988 amendments (P.L. 100-472) which stated: "Furthermore, the fact that the Secretary has decided to allocate funds to a local agency in a particular manner should not bar the tribe from contracting for functions, such as criminal investigation, for which funds have not been allocated to that particular agency." S. Rep. No. 100-274, 25 (1987). Tribes should be able to re-design programs to meet tribal priorities.

This matter should not be handled under "contractibility." The availability of funding for any self-determination contract is, of course, subject to the appropriations made by the Congress annually. See 25 U.S.C. § 450j-1(b).

c. Functions v. Services -- The proposed regulations dramatically narrow the field of contracting under the Act by defining the term "program" as "the operation of services for tribal members and other eligible beneficiaries". Proposed § 900.106(c) notes that some contractible services may be performed at higher organizational levels within the DHHS and DOI, but states that this "does not permit the transfer ... of inherently Federal responsibilities involving the exercise of significant authority under the Constitution, and functions integral to the exercise of discretion, judgment or oversight vested in the Secretary by law or by virtue of the Secretary's trust responsibilities."

The proposed limitation on the contractibility of supervisory tasks is contrary to the intent of Congress and section 102 of the Act which authorizes the Secretary to enter into contracts with tribal organizations "to plan, conduct and administer programs." The Senate Indian Committee emphasized the breadth of the 1988 amendments to the Act:

> "Tribes have the right to contract for BIA Agency functions, IHS Service Unit functions, and BIA and IHS Area Office functions, including program planning and statistical analysis, technical assistance, administrative support, financial management including third party health benefits billing, clinical support, training, contract health services administration, and other program and administrative functions. The tribes also have the right under the Indian Self-Determination Act to work with the Secretary to redesign BIA and IHS Area Office, Field Office, Agency and Service Unit functions to better meet the needs of the tribes served directly by such offices.
>
> * * *
>
> "The Committee has also included language to direct the Secretary to enter into contracts with tribal organizations to plan, conduct and administer any or all of the functions, authorities and responsibilities of the Secretary of Health and Human Services under the Act of August 5, 1954 (68 Stat. 674), as amended. The intent of the Committee is that administrative functions of the Indian Health Service are contractible under the Indian Self-Determination Act." Emphasis added.

S. Rep. 100-274, 23-24 (1987).

We find nothing in the legislative history of P.L. 93-638 that indicates that what Congress intended by 'program' was limited to the 'operation of services.' Indeed, the statute itself and the legislative history consistently use the phrase "programs or services," or "program or function" which implies that the content of "programs" is broader than just "services." 25 U.S.C. § 450f. If "functions" were not intended to be contractible under the Act, why do the proposed regulations go to the trouble of preparing a non-exhaustive list of Federal "responsibilities and functions" which cannot be contracted? See § 900.106(d). The legislative history notes that trust functions are to be contractible under the Act: "The intent of the law is to enable tribes to improve the protection of trust resources by operating the technical functions relating to the trust responsibility while preserving the Federal Government's obligations as trustee for Indian lands and resources." S. Rep. No. 100-274, 25 (1987).

As proposed, § 900.106(d) sets forth a non-exhaustive list of 11 Federal responsibilities and functions which are not contractible under the Act, (e.g., deciding Federal administrative appeals), together with a 5-part test to determine which Federal responsibilities and functions are non-contractible (e.g., required by law to be carried out by Federal officials), followed with an 8-part test to determine whether an applicant tribe benefits from a program proposed for contracting (e.g., whether the program is within the tribe's geographic base), and topped off by a 7-part test wherein any positive finding would result in the Secretary declining the contract proposal (e.g., program would require an environmental impact statement before contracting).

These complex and wholly unnecessary hurdles clearly represent one more attempt by the authors of this language to thwart federal Indian policy established by Congress and the President (and, indeed, by the Secretaries, themselves). 'Mutiny' would not be too strong a word to describe it. By expanding those 'functions' which cannot be contracted, agency officials will be enabled to effectively decline a contract proposal which seeks to contract an agency 'function' even though Congress contemplated the contracting of such function, by simply declaring it non-contractible and so exempt from the declination appeal procedure.

Paragraph (d) which sets out the non-exhaustive list of 11 functions which are not contractible under the Act, begins by stating:

> 'Contracting for the operation of services to tribal members and other eligible beneficiaries, however, does not permit the transfer to the tribe or tribal organization of inherently Federal responsibilities involving the exercise of significant authority under the Constitution, and functions integral to the exercise of discretion, judgment or oversight vested in the Secretary by law or by virtue of the Secretary's trust responsibilities.' Emphasis added.

This provision is so broadly worded that, if it were to be literally read, very few contracts could be awarded under the Act. See Legal Memorandum attached as Exhibit A.

***Recommended Revision:***

We recommend deletion of language at 900.106 (a)(1)(v) which begins 'A program or portion of a program' ... through 900.106(a)(1)(v)(A), (a)(1)(v)(B) and (a)(1)(v)C.

We recommend deletion of §900.106(a)(2) in its entirety.

Note, also, our proposed change in definition of 'program' as we have recommended at 900.102. In addition, we recommend that 900.106(c) be revised to read:

**(c) The Act directs the Secretary to contract for "programs or portions thereof." The term "program" is defined in §900.102. Programs subject to contracting under these regulations may be performed at any organizational level within the DHHS and DOI, including, but not limited to, determining the eligibility of applicants for, and the amount and extent of, assistance, benefits, or services in accordance with the terms of the contract and applicable regulations of the appropriate Secretary: Provided, that the Secretary shall not make any contract which would impair the ability to discharge trust responsibilities to any Indian tribe or individuals or obligation under the Constitution to ensure the laws are faithfully executed.**

We recommend deletion of paragraphs 106(d), 106(e), 106(f), 106(g) and 106(h); proposed 106(e) should be replaced with the following language:

**(e) The Secretary is not authorized to enter into any contract under this Part if such a contract;**

**(1) is entered into on behalf of an Indian tribe that has not approved the letting of the contract by tribal resolution;**

**(2) authorizes or requires the termination of any trust responsibility of the United States with respect to the Indian people; or**

**(3) is prohibited by law.**

Divisibility (900.107) (3182) -- The clear wording of the Act does not impose upon the Secretary the requirement to apply the three-part declination criteria (program or function to be contracted will not be satisfactory, protection of trust resources are not assured, project or function to be contracted cannot be properly completed or maintained) against the non-contracted portion of the contract. Nonetheless, the proposed § 900.107 on 'program division' takes the position that the Secretary must apply the declination criteria to the non-contracted portion of the program. If a contract proposal would result in unsatisfactory services to the remaining Indian beneficiaries, the contract proposal must be declined, even when it cannot be declined on any criteria applicable to the applicant's proposed plan of operation.

We note that the BIA, until the publication of the NPRM, took the position that, unlike the IHS and the non-BIA bureaus of the

Interior Department, it would not apply the declination criteria to the non-contracted portion of a program.

Upon receipt of a contract proposal requiring the Secretary to divide a program serving more than one tribe, the Secretary must, within 10 days, send copies of the proposal to all affected tribes and provide them an opportunity to comment on the contract proposal. This provision is appropriate in view of the fact that other tribes served by the program may be adversely affected by the proposed contract, but the regulations are dangerously vague as to what constitutes an "affected tribe". The regulations should provide that copies of the proposal will be sent within ten days to all tribes for whose programs, projects or activities funding may be reduced as a result of the approval of the proposal or if the proposed contract would impair the Secretary's ability to discharge a trust responsibility to such tribe or its members.

While we disagree with the approach of applying declination criteria to non-contracted portions of a program, we recognize the difficulty of the problem. We agree with the emphasis placed in § 900.107 on a negotiated resolution of divisibility issues among affected tribes. Of course, in matters so directly affecting tribal welfare, a consensus solution may not be possible. However, the Act simply does not authorize a declination on the ground that services to Indians not served under the contract will not be satisfactory. A declination in such cases should be based on the third declination criterion. The Secretary's trust responsibility to all tribes precludes his diverting financial assistance from a non-contracting tribe or tribes so as to reduce the level of funding available for services to it and he is expressly not required to do so under the provisions of the Act. 25 U.S.C. §§ 450j(g), 450j-1(b). Consequently, a contract may not be "properly completed or maintained" if it adversely affects the Secretary's ability to support service levels for other tribes or which impairs the Secretary's ability to discharge a trust responsibility to another tribe or its members.

We think that the regulations should affirmatively state, as the present Interior regulations do, that a proposal should be declined when the Secretary determines that the requested funding cannot be provided "without significantly reducing services under the non-contracted programs or parts of programs." 25 C.F.R. § 271.23(d)(2)(i). This would be a declination under the third declination criterion because the Secretary is not required to enter into a self-determination contract which adversely impacts a non-contracting tribe. Consequently, such a contract cannot be properly completed or maintained. This approach would be consistent with § 900.103(b)(7) of the proposed regulations which states that "the Secretary will insure that non-contracted programs are not adversely affected." Congress has demonstrated and reinforced its intent to maintain services to non-contracting tribes in section 306 of Title III of the Indian Self-Determination Act providing for self-governance compacts.

While the policy of the Act is to encourage tribal self-government, it is clearly not the purpose of the Act, or the policy of the United States, to encourage the self-government of one federally-recognized tribe to the detriment of the legal rights and welfare of another federally-recognized tribe. Nevertheless, declination should be firmly based on statutory authority and, in addition, the proposed regulation gives inadequate guidance to agency officials as to the circumstances when a proposal should be declined because of such adverse impact. When such a declination occurs, the agency's judgment should be subject to challenge in a declination appeal.

***Recommended Revision: §900.107(b)***

We recommend §900.107(b)(1) be revised as follows:

**(b) In order to facilitate contracting of programs serving more than one tribe, the Secretary shall:**

**(1) Within 30 days of receiving a proposal from a tribe or tribal organization to contract for its proposed share of a program serving other tribes: (i) provide the tribe submitting the proposal with a notice indicating the amount of funding the Secretary has determined pursuant to §900.114 to be available in connection with that program pursuant to 106(a)(1); and (ii) send copies of the proposal to all affected tribes other than those submitting the contract proposal.**

§900.107(b)(3) should be revised to include affected agencies in consultations regarding program division by adding the words "and tribe-agency" between "inter-tribal" and "consultation."

***Recommended Revision***

We recommend that § 900.107(d) should be revised as follows:

**(d) For purposes of determining whether or not to decline the proposal under §900.207, the Secretary, after thorough consideration of options available to the Secretary for redesign of the program, which is proposed for division in order to achieve the goals serving the interests of both the contracting and non-contracting tribe, shall consider whether the proposed contract can be properly completed and maintained with the available funding.**

Amount of Funding (900.108) (3183) -- This section is intended to implement § 106 of the Act which pertains to contract funding. Congress considered inadequate funding of self-determination contracts to be perhaps the "single most serious problem with implementation of the Indian self-determination policy." The intent of the 1988 amendments was "to protect and stabilize tribal programs by protecting and stabilizing the funds for those programs from inappropriate administrative reduction by Federal agencies." Senate Report No. 100-274 at 8 and 30.

Section 900.108, like section 106 of the Act, divides funding into two separate allocations. Tribal contractors shall receive the "Secretarial amount", which is the direct program amount which the Secretary would have had to operate the program "based on the processes actually utilized by the Secretary to allocate resources among program activities." Often contractors do not know what processes are actually used by the Secretary to allocate resources. Conflicts over funding and divisibility could be limited and tribal financial planning could be enhanced if such information were provided regularly to tribes.

Added to the direct program amount is an amount for contract support costs "in accordance with the allocation processes actually utilized by the Secretary." Contract support costs in section 106(a) of the Act are defined as "reasonable costs for activities which must be carried on by the contractor to ensure compliance with the terms of the contract and prudent management, but which (A) normally are not carried on by the respective Secretary in his direct operation of the program or (B) are provided by the Secretary in support of the contracted program from resources other than those under contract." 25 U.S.C. § 450j-1(a)(2).

Our principal objection to § 900.108 is the reference to "processes actually utilized by the Secretary" which appears to control the amount to which a tribal contractor is entitled, rather than the statutory definition. If the "processes" of the Secretary do not produce the amount to which the tribe is entitled under section 102 of the statute, then on appeal the tribal contractor should be entitled to challenge such "processes".

In previous versions of the proposed regulations, "contract support costs" were defined as being either recurring or non-recurring to the contractor and may be recovered as direct costs or a combination of direct and indirect costs in accordance with the Financial Management subpart of the regulations. This language has been removed in the latest version without explanation. It should be restored since activities funded from "contract support" as defined in the statute may be included in a tribe's negotiated indirect cost pool or in its direct cost base. See ISDM No. 92-2 for present IHS policy on this matter.

***Recommended Revision:***

We recommend the following revisions to 900.108(a)(1):

(1) **The Secretarial amount shall consist of the amount that the Secretary would have provided for the Secretary's operation of the program(s) to be contracted. This amount shall be determined based on the amount previously provided by the Secretary for operation of the program, adjusted to reflect actual appropriations for the current year. In the case of programs initially funded by Congress, allocations for contracts shall conform to congressional directives and be otherwise equitable.**

Specific Types of Costs (900.108(b) -- Eighteen examples of contract support costs are listed in the proposed regulations. We are concerned about several of these examples.

a. Legal Fees -- Legal fees for appeals and litigation are only payable under the Equal Access to Justice Act (EAJA). The ability of tribes to challenge tentative and appealable decisions of lower and middle level federal decision-makers through the dispute and appeal procedures provided in the Act using contract funds is essential for the accomplishment of the fundamental purposes of the Act. Legal fees for advice on the exercise of appeal rights under the regulations up through a final Departmental decision should be an allowable cost payable from contact support funds in accordance with the intent of Congress. See Senate Report 100-274 at page 35.

Exclusion of such costs would deny legal assistance to tribes which is essential to the assertion of tribal rights at the Departmental review level. The strict standards applicable to the recovery of costs under EAJA should not limit legal advice to tribes in seeking Departmental review of BIA and IHS decisions. In the negotiation of self-governance compacts under Title III the agencies have agreed with this position. We find no basis in the legislation for the agencies to make it easier for a compacting tribe under Title III to pursue an administrative appeal in the event of an administrative denial of tribal rights than it is for a tribal contractor to do so under Title I.

***Recommended Revision:***

§ 900.108(b)(10) should be revised to read:

(10) **Legal services, including reasonable expenses to retain legal counsel for activities related to the operation of programs and administrative matters.**

**including policy and contract review, employee functions, and administrative appeals of decisions of contracting officers pursuant to §§900.802 and 900.803, but not attorney fees for litigation in federal court which shall be payable under the Equal Access to Justice Act (EAJA) in accordance with §900.804(b) of this Subpart.**

b. *Facility and Capital Equipment Costs* -- The September 30, 1990 Joint Draft, which reflected substantial negotiations between the agencies and tribal representatives, included 'amortization or depreciation of contractor owned property' and 'replacement and cost recovery' of capital equipment as allowable contract support costs. These were cost items the importance of which were stressed by tribal representatives and financial advisors. We urge that they be restored as otherwise tribes may not in many instances be fully reimbursed for tribal property provided for the use of federally-funded programs.

c. *Agency Savings* -- The proposed regulations permit, but do not require, the Contracting Officer to identify agency savings resulting from contracting and provide them to tribal contractors provided satisfactory levels of services to other programs are maintained and trust and other federal obligations are fulfilled. This section should be revised to *require* the agency to transfer savings to tribal contractors when the specified conditions are met and that they will remain available until expended. We note that § 103(b)(7) contemplates that Secretarial function will change in scope and extent as a result of Indian self-determination and that savings may result but reserves the right to provide additional services as well as to provide such savings to tribes. Is this consistent with Congressional intent?

***Recommended Revision:***
§900.108(e) should be revised to read:

**(e) As programs are contracted and as savings become available, the Secretary will identify such savings and shall provide them to tribal contractors to the extent to which:**

**(balance of section unchanged)**

d. *Congressional 'Earmarks'* -- In clear violation of the Act, the proposed regulations at 900.108(g) (p. 3184) state that when Congress provides additional funding specifically for an Indian tribe or tribal organization, 'the amount provided shall be deemed to include contract support costs, unless otherwise provided by Congress.' This language reflects a policy illegally implemented by the Indian Health Service in 1992 with respect to program increases appropriated by Congress. It is crystal clear that the distribution of congressional increases to tribally-operated and "638"-operated activities of IHS on the same basis (i.e., without an adjustment to provide "contract support" to "638" contractors) violates the plain language of section 106 of the Act. We have called this violation to the attention of the Indian Health Service, which has ignored the matter. Funds specifically earmarked for tribes may be administered either directly by the agency or under contract by the tribe. If contracted, section 106 of the Act requires the addition of contract support costs in order to prevent a financial penalty for contracting the services. To the extent that congressional appropriation language bars such an adjustment, Congress would be acting inconsistently with the plain language of section 106. Under established principles of statutory construction, every effort should be made to avoid that result. Certainly, it should not be mandated by regulation.

***Recommended Revision:***
§900.108(g) should be revised to read

**(g) The Secretary shall provide contract support funds in support of programs funded by Congress specifically for a tribe or tribal organization in the same manner as provided in §900.108(a)(2) unless otherwise provided by law.**

Funding and/or Contractibility Impasse (900.109) (3184) -- This section is misleading in implying that in a funding dispute a tribe has full appeal rights under the proposed regulations, including a due-process hearing. In the case of IHS, the proposed regulations in Subpart H do not accord such rights. See discussion below under Subpart H.

Limitation of Funds (900.110) (3184) -- The proposed regulations change the "limitation of costs" language now included in all cost-reimbursement contracts under P.L. 93-638. See, for example, 48 C.F.R. Ch. 3, Appendix A, § PHS 352.280-4A, Clause No. 3. The changes remove specific provisions making clear that the amount of the contract is based on an estimated cost and expressly providing for notice by the contractor to the contracting officer "if the contractor has reason to believe that the total cost to the Government, for the performance of this contract, will be substantially greater ... than the estimated cost thereof", together with a revised cost estimate. The new clause retains language under which the Secretary is not required to increase the amount of the contract in such circumstances and the contractor is not required to continue performance or otherwise incur costs beyond the amount of the contract. However, the changes seem to move the award instrument in the direction of a "fixed price" contract. Language referring to "estimated cost" and notice of a funding deficiency should be restored.

***Recommended Revision:***
§ 900.110(c) should be revised to read:

**900.110(c) -- The contractor shall not be obligated to continue performance beyond the amount of funds awarded, and if at any time the Contractor has reason to believe that the total amount for performance of this contract or a specific activity of this contract will be greater than the amount awarded, the Contractor shall notify the appropriate Secretary. If the amount awarded is not increased, the Contractor may cease performance. In such event all duties and responsibilities previously assumed by the Contractor shall become the duties and responsibilities of the Secretary.**

Increases to Contracts (900.114) (3185) -- The proposed regulations have revised this section to read that, when additional funds become available, the Secretary shall provide such funds to contracted programs on the same basis as such funds are provided to programs operated directly by the Secretary. Earlier drafts had also required the Secretary to notify Indian tribes and tribal organizations within 60 days of the availability of additional funds. Without explanation this language has been removed and it should be restored to assure the tribes are fully informed as to the availability of such funds.

Indian Preference and Equal Opportunity (900.115) (3185) -- Under the proposed regulations, contractors must, to the greatest extent feasible, give preference to Indians regardless of tribal affiliation in training and employment. A contractor, however, is subject to any "supplemental Indian preference requirements established by the tribe receiving services under the contract."

In the proposed regulations the Departments solicit public comment on whether the regulation should prohibit tribal supplemental requirements which give preference to Indians on the basis of membership in, or affiliation with, a particular tribe.

We have reviewed the DOI legal opinions referenced in the supplemental information. We think that the law clearly permits a three-tier preference policy under which qualified tribal members receive first preference, qualified Indians and Alaska Natives a second preference, and the position is then opened to other qualified persons. The regulations should make clear that there must be compliance with tribal law requiring such an approach. We have attached a legal memorandum, dated April 15, 1994, on this issue as Exhibit B. The regulations should clarify that a tribal preference may be given (if required by tribal law or at the option of the tribal contractor) so long as an opening is not filled by a non-Indian until all Indians (including Alaska Natives) are given preference.

**Recommended Revision:**

We recommend revising 900.115(a) as follows:

> **Contractors, subcontractors, grantees, and subgrantees shall, to the greatest extent feasible, give preference in training and employment to Indians in such manner and to such extent as may be provided by tribal law and, in the absence of tribal law, shall give preference to Indians without regard to tribal affiliation subject to subparagraph (d) below.**

Equal Opportunity and Civil Rights (900.116) -- This section is contrary to both Title VII of the Civil Rights Act of 1964 and the Indian Self-Determination Act, and should be deleted. Title VII prohibits an "employer" from discriminating against an employee "because of such individual's race, color, religion, sex or national origin." 42 U.S.C. § 2000 e-2(a). The term "employer" is defined to exclude "an Indian tribe." 42 U.S.C. § 2000 e(b). Thus, tribes are exempt from Title VII. See Wardle v. Ute Indian Tribe, 623 F.2d 670, 672 (10th Cir. 1980). Tribal organizations under the Self-Determination Act are also considered "tribes" exempt from Title VII. Barnes v. Bristol Bay Area Health Corp., No. A92-459 Civil (D. Alaska 1993).

We understand that the agencies claim that the proposed regulation is authorized by Executive Order 11246, despite the tribal exemption from Title VII.[1] We disagree, since Executive Order 11246 cannot make unlawful activity which is lawful under Title VII. See United States v. East Texas Motor Freight System, 564 F.2d 179, 185 (5th Cir. 1977); Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d 216, 227 (5th Cir. 1977), rev'd on other grounds, 443 U.S. 193; United States v. Trucking Management, Inc.,

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[1] The proposed rule goes beyond Executive Order 11246 in that it prohibits discrimination based on age or handicap -- types of discrimination not covered by the executive order. Since tribes are not subject to federal laws prohibiting discrimination in employment based on age or handicap, to this extent, at least, the regulation has no basis in law. See Americans with Disabilities Act, 42 U.S.C. § 12111(5) (adopting Title VII definition of "employer," thereby excluding tribal employees from coverage); E.E.O.C. v. Fond du Lac Heavy Equip. Corp., 986 F.2d 246 (8th Cir. 1993) (tribal employers exempt from Age Discrimination in Employment Act (ADEA) suit brought by tribal members); E.E.O.C. v. Cherokee Nation, 871 F.2d 937 (10th Cir. 1989) (tribe exempt from ADEA suit).

662 F.2d 36 (D.C. Cir. 1981). Furthermore, the Self-Determination Act provides that self-determination contracts are not procurement contracts, 25 U.S.C. § 450 b(j), and are expressly exempt from the Federal Procurement Policy Act, 41 U.S.C. § 401 et. seq. and the FAR. 25 U.S.C. § 450j(a). As Executive Order 11246 is implemented in the FAR, it should be deemed to have been waived by Congress in the Act.

Even if Executive Order 11246 were not contrary to Title VII or the Act, the Secretaries should waive the order pursuant to their authority to do so under the Act. 25 U.S.C. § 450j(a). The imposition of the anti-discrimination provision is contrary to the congressional policy of treating tribes as governments capable of running their own affairs, as recognized in the Act, Title VII, and numerous other laws. Remedies for discrimination by tribal employers should be left to the tribes and tribal courts. See Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65 (1978) ("Tribal forums are available to vindicate rights created by the [Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303]"). Moreover, the effect of the proposed rule would probably be to subject all of a tribe's operations to Executive Order 11246 since neither the rule nor the order is limited to the contracted program. See Board of Governors, Univ. of North Carolina v. United States Department of Labor, 917 F.2d 812 (4th Cir. 1990) (all campuses of state university subject to Executive Order 11246, not just those campuses receiving federal funds).

Record-keeping (900.121) (3186) -- The proposed regulations require contractors to maintain records to "allow the Secretary to meet his legal records program requirements under the Federal Records Act," as well as to facilitate contract retrocession and reassumption, without specificity as to what records are intended by this language. The Federal Records Act applies to federal agencies and not to contractors. Its purpose is to assure the preservation of information "necessary to protect the legal and financial rights of the Government and of persons directly affected by the agency's activities." 44 U.S.C. § 3101. Compliance with the Act will be extremely burdensome for contractors and is not necessary to protect the rights described above. As noted in the Senate Report on S. 3237, "[o]ne of the primary goals of the 1988 amendments was to eliminate excessive and burdensome reporting requirements." S. Rep. No. 444, 102d Cong., 2d Sess. 5 (1992). The specific requirements of section 5(a)(1) of the Act as to financial data, retention of records and the program data requirements of Subparts N and O are adequate to fulfill the goals of the Act without imposing additional requirements on tribal contractors.

To the extent that any additional types of reports are legally required, they should be listed in the regulations. However, there is no legal basis for imposing the requirements of the Federal Records Act on tribal "638" contractors. More specific and limited record retention language should be negotiated with tribal representatives and language clarifying that contractors may dispose of or destroy records at the end of the retention period should be included in the regulations. The agencies have introduced a new burdensome requirement that records be transferred to the National Archives. It is difficult to see how this new requirement serves the "primary goal" noted above.

**Recommended Revision:**

Section 900.121(a) should be revised to read:

**(a) Record-keeping. Each contractor shall keep records necessary to facilitate contract retrocession or reassumption under Subpart K of this Part which shall be identified in a list approved by the Secretary and the contractor. Record-keeping requirements to be specified in a contract shall be subject to negotiation and appeal under the declination criteria and appeal procedures in Subpart E.**

We further recommend that 900.121(c)(1) and (c)(2) be revised to read:

**(c) Retention of Records. (1) The contractor shall retain its financial records and such other records as may be specifically identified in the contract for three years from the starting date specified in paragraph (c)(4) of this section. If any litigation, claim, negotiation, audit or other action involving the records has been started before the expiration of the three-year period, the records shall be retained until the action is completed.**

We also recommend that a new §900.121(c)(2) be included:

**(2) At the end of the retention period records may be destroyed or otherwise disposed of.**

## §900.124 - MONITORING

Monitoring (900.124) (3186) -- Tribal representatives urged that federal monitoring visits (with specified exceptions) take place no more than one each year for each self-determination contractor. Section 900.124 allows each "operating division, Departmental Bureau, or Departmental agency" or duly authorized representative, to make no more than one monitoring visit per contract. In view of the small staffs and limited resources of many tribes, the one-per-contractor limitation should be set forth in the regulations. Tribal contractors may, of course, agree to more frequent federal monitoring visits as may be appropriate for the particular program.

**Recommended Revision:**
We recommend that the first phrase of 900.124(c) read:

**The Secretary or a duly authorized representative may make no more than one annual formal performance monitoring visit per contract or, unless:**

**SUBPART B - PRE-AWARD AND APPLICATION PROCESS**

Tribal Resolution (900.202) (3187) -- Re-delegation authority, specific to Alaska, contained in the last draft, has not been restored to the proposed regulations despite support for such language from the IHS Alaska Area Office and Alaska tribal representatives. Under such authority, a tribal organization in Alaska could re-delegate its authority to contract under the Act to another tribal organization so long as advance notice was provided to the effected tribes. Under the Alaska proposal, tribal villages, would retain the authority to restrict or rescind their tribal resolutions.

The re-delegation authority language is supported by Alaska tribal representatives due to the multiple entities qualifying as Indian tribes in Alaska, the vast areas covered by self-determination contractors, the isolation of Alaska Native villages and the resulting high cost of duplicative consultation requirements between villages and tribal organizations to which they have delegated contracting authority. The requested provision would have no effect on any tribes or tribal authorizations, except those in Alaska. We think these Alaska-specific regulations should reflect the wishes of Alaska Natives and the unique circumstances of Indian tribes in Alaska.

Pre-Application Technical Assistance (900.203) (3187) -- The proposed regulations provide that tribes and tribal organizations interested in contracting should request information on the "Secretarial amount" prior to their submission of a contract proposal. The Secretary has 30 days (up from 15) to identify the "Secretarial amount" as well as information on available contract support costs. Apparently under § 900.203 potential contractors are required to submit a contract proposal which includes the "Secretarial amount" as identified by the Secretary together with the identified amount of contract support costs.

The proposed regulations imply that contractors must request no more than the "Secretarial amount." The regulations should make clear that a tribe is not required to accept the amount identified by the Secretary and may submit a proposal based on its own determination of the legally required funding level, subject to declination and appeal rights.

The proposed section 900.203(a)(4) requires technical assistance from Interior to develop program requirements which differ from Subpart O, but does not require such assistance from IHS to develop program requirements which differ from Subpart N. We cannot believe that the intent of the drafters is to distinguish between the obligations of the two agencies on this matter and assume that the omission of reference to Subpart N is inadvertent.

**Recommended Revision:**

We recommend a new subparagraph (5) should be added to 900.203(a) as follows:

**(5) To develop program requirements which differ from the Secretary's requirements in Subpart N of this Part.**

An additional sentence should be added to 900.203(c) as follows:

**Tribes or tribal organizations which are not in agreement with the amount identified by the Secretary as the Secretarial amount may proceed in accordance with 900.109 including the exercise of appeal rights pursuant to Subpart H.**

Proposed section 900.204 is deficient in failing to require the disclosure of data on the amount of funds which would have been provided for the direct operation of the program for the proposed contract period (see 25 C.F.R. § 271.16 which requires such disclosure) and its failure to require disclosure of data on existing federal facilities used in the program. The disclosure of plans for future funding is essential to assure that reductions are not made in anticipation of "638" contracting.

**Recommended Revision:**

We recommend that new subparagraphs be added as follows:

**(6) Data on the planned amount of funds to be provided for the direct operation of the specific program(s) or portions thereof to be contracted for the proposed contract period.**

**(7) Information on existing facilities and real and personal property used by the Department in the administration of the program.**

Initial Proposal Requirements -- (900.205) This section suggests that a tribal organization may develop the contract statement of work but, when this section is read together with Subpart N, it is clear that the present language of the regulations requires compliance by an IHS contractor with JCAHO or HCFA standards. See discussion below under Subpart N. The proposed regulation also includes a requirement for a statement on conflicts of interest. The conflict of interest language (900.205(u), p. 3188) should be removed except when the proposal relates to trust resource programs or services. This is an unnecessary provision for the vast majority of contractible programs under the Act. There is no statutory basis for such a requirement except when trust resources are involved and the requirement is an intrusion on tribal governmental authority in direct conflict with the purposes of the Act.

**Recommended Revision:**
The first sentence of 900.205(u) should be revised to read:

**(u) In cases in which the program to be contracted involves the administration of, or otherwise involves, trust resources, in the event that there is a potential conflict of interest on the part of the contractor as an organization, a description of the potential conflict and description of the procedures to be employed to avoid an organizational conflict of interest.**

Review and Approval of Contract Proposals -- (900.206) (3189)

a. Failure to Act -- The proposed regulations provide that a proposal which has not been declined or approved by the 90th day after submittal (when the deadline has not been extended with the written consent of the applicant) will be deemed approved on such day at the funding level determined by the Secretary, provided that requested tribal resolutions have been filed and the program is 'contractible.' The proposed regulations do not identify the procedures to be followed in the event of such approval. Clarification, as to such procedures, including the deadline for contract award, should be included in the regulations. The present language could serve as a basis for denying a tribe its appeal rights under Subpart N on the ground that its proposal has been "approved", not declined. Instead, failure to act should be construed as a declination.

The proposed regulations delete language from the September 1990 proposed draft which stated that if the contract is not awarded within thirty days of approval, the contractor need not exhaust appeal procedures under the regulations and may go directly to federal court. Such language should be reinstated. It represents a compromise carefully negotiated between tribal representatives and the federal agencies. If the tribal request that failure to award a contract within 30 days will result in an automatic contract is not accepted, then at least the negotiated compromise should be included in the regulations.

***Recommended Revision:***
We recommend that paragraph (d) be revised as follows:

**(d) If no action is taken to approve the contract proposal within 90 days, or for such longer time as extended pursuant to paragraph (c) of this section, and absent a timely finding as provided in paragraph (b) of this section, at the election of the applicant (1) the contract proposal shall be deemed to have been declined on the 90th day or on the last day of any extension pursuant to paragraph (c) of this section and the applicant may exercise its rights under Subpart E or (2) the application shall be deemed approved at such funding level as the Secretary may have determined under § 900.108 or at the funding level stated in the application, whichever is less, subject, however, to any limitations imposed by express provisions of statutory law. The applicant may exercise this election by notice in writing to the Secretary and it shall be effective on the date the Secretary receives such notice.**

We also recommend inclusion of the following new paragraph (e):

**(e) If the Secretary fails to issue an award within 30 days of approval, the applicant is entitled to go directly to Federal court for appropriate legal and equitable relief and shall not be required to exhaust appeal procedures set forth in these regulations.**

b. Funding Level Disagreements -- We object to the distinction made in 900.206 between "declination issues" and a dispute over whether the proposed budget exceeds the funding amount identified by the agency for the program. This distinction is intended by the IHS to create a process under which tribes are deprived of statutorily-based "due process" hearings when a proposal is declined because the agencies disagree with the tribes analysis of the funding amount. Under the Act, the Secretary is required to "provide the tribal organization with a hearing on the record and the opportunity for appeal on the objections raised."

See 25 U.S.C. 450f(b). Such objections clearly include an objection to the funding amount requested. This continued refusal of federal officials to accept the plain language of the statute on this point is disheartening. See further discussion under 900.802(a).

***Recommended Revision:***
We recommend that 900.206(a)(4)(iii) (3189) be deleted and that 900.206(a)(4)(iv) be revised to read:

**(iv) Whether declination issues exist, including whether the proposed budget exceeds the Secretarial amount identified in accordance with 900.203(c) for the functions or program or portion thereof to be contracted.**

We also recommend deletion of 900.206(a)(4)(iii).

c. Divisibility Issues -- The proposed regulations would permit a declination to be based on "the effect that funding the proposed contract would have on Indian beneficiaries or trust resources of the portion of the program that would not be contracted." As noted above, such a provision focuses on the services provided by the Secretary to persons or entities not served under the proposed contract. Such an inquiry is dependent on potentially large volumes of information in the exclusive control of the Secretary. In addition, the Secretary's willingness or reluctance to restructure the program will weigh heavily in the making of any determination under § 900.206. The determination of whether a program can be contracted should focus on the ability of the contractor to execute the program given the funding level established under § 106 of the Act and whether the Secretary can continue to meet his responsibilities to other Indians. One alternative solution to this problem is discussed above under § 900.107.

d. Technical Assistance -- The proposed regulations are not consistent with the language of the Act pertaining to technical assistance once the Secretary has declined a proposal. The Act provides that the Secretary "shall provide assistance to the tribal organization to overcome the stated objections." As proposed, the regulations state only that the Secretary's notice shall include "any available technical assistance." The regulations should be consistent with the language of the Act.

We recommend that the final sentence of §900.206(b)(3) be revised to read as follows:

**The notice shall include, at a minimum:**

**(1) Detailed explanation of the reason for the decision not to contract;**
**(2) A description of all available appeal rights under subpart H; and**
**(3) A description of the technical assistance which the Secretary will provide in order to assist the tribe or tribal organization to overcome the stated objections.**

## §900.207 - DECLINATION

Declination (900.207) (3189) -- While § 900.207 maintains the standard that "the burden of proof is on the Secretary that one of the specific grounds for declination exists and that, therefore, the application must be declined...", the agencies have undercut the declination requirements of the statute by excluding the issue of the level of funding from the declination process. In addition, unlike current regulations of the BIA (25 CFR 271.15(a)) which clarify that the Secretary carries of the burden of proof to demonstrate, "through substantial evidence", that one of the three statutory grounds for declination exist, the NPRM fails to include the level of evidence required. We recommend incorporation of the phrase "substantial evidence" into this section.

Section 900.207 is also deficient in that:

a. Divisibility -- As noted previously, the proposed regulations provide that in considering whether to approve or decline an application, the Secretary may apply the declination criteria against the non-contracted portion of the program (the portion retained by the Secretary). For the reasons already explained, we think this provision is inconsistent with § 102 of the Act.

b. Presumptions -- Proposed section 900.207 would make presumptions (contained in existing BIA and IHS regulations) in favor of substantive knowledge of the program, tribal community support, and adequacy of tribal personnel rebuttable. We think these presumptions should not be rebuttable when conditions specified in the regulations are met. Interior and HHS should not involve themselves in intra-tribal matters to resolve internal opposition to the position adopted by the tribal governing body. By this change, the agencies are, once again, using the opportunity to issue new regulations to narrow tribal rights and increase agency discretion (clearly not the intent of the 1988 amendments under which the regulations are being issued).

c. Trust Programs -- The proposed regulations add special requirements for proposals involving a trust responsibility or trust resource which generally follow the existing provisions of 25 C.F.R. 271.34. However, the present language in which it is made clear that a tribal proposal to raise performance standards in a trust-related program shall not be used as a reason for declination has been deleted. The deletion suggests a view on the part of the Bureau of Indian Affairs that trust programs can only be effectively operated in the way the Bureau operates them, a view extremely difficult to reconcile with the BIA record. This is contrary to the intent of the Act. Once again, the federal agency has come up with a change which is less favorable to tribal self-determination than the existing regulations.

***Recommended Revision:***

We recommend deletion of subparagraph 900.207(c), and the deletion of the word 'rebuttable' in paragraph (e) of 900.207 (3189).

## SUBPART C - CONTRACT AWARD AND MODIFICATIONS

Renewal of Fixed-Term Contracts (900.304) (3190) -- The proposed regulation (900.304(a)(2)) states that if a contractor fails to notify the Secretary of its intent not to renew the contract 120 days in advance of the contract expiration date, the Secretary may unilaterally renew the contract for up to one year or take other actions to reassume the contracted program. Paragraph (4) of this section, however, provides that the Secretary may only extend a fixed term contract for a limited time "as agreed to by the Indian tribe or tribal organization." These provisions are clearly inconsistent. If it is the intent of the agencies to extend a term contract only with the consent of the tribal organization, the provision should be rewritten. We fail to see how the Secretary can lawfully renew or extend the contract without reaching a mutual agreement with the contractor. The imposition of contract obligations upon a tribal organization without any resolution from the governing body of the tribe or the signature of any official thereof can scarcely be regarded as consistent with tribal self-determination. The September, 1990 draft regulations provided that if the contractor failed to notify the Secretary, the Secretary would notify the tribe(s) served by the contract and take such steps as were required to assume responsibility for the program upon its expiration or at a date mutually determined by the parties.

***Recommended Revision:***

We recommend that 900.304(a)(2) be replaced with the following provision:

**(2) If a renewal request or a statement of intent not to renew is not received by the date specified in the Secretary's notice, the Secretary shall notify the contractor and the Indian tribe(s) served by the contract,**

**if different, (by certified mail) that the contractor must make its intentions known to the Secretary within 30 days of receipt of such notice or the Secretary will take necessary action to assume responsibility for the program upon expiration of the contract or such other time as may be mutually determined to be appropriate.**

We recommend also that 900.304(b)(3) (annual funding of contracts) be revised to read:

(3) **If such a budget is not received within the specified 60 days, the Secretary shall notify the contractor and will, subject to the consent of the contractor extend the contract on a month-to-month basis at the same level of funding as the previous year, subject to the availability of appropriations.**

Contract Modifications (900.305) (3190) --

a. Re-budgeting -- It appears that under the proposed regulations re-budgeting (shifting of funds between contract line-items) in the total award requires a bilateral modification except that a contractor would be permitted to shift up to 10% of funds allocated to a BIA tribal priority allocation program from another tribal priority allocation program under the contract without Secretarial approval.

Under present IHS guidelines rebudgeting is permitted within the approved budget without Secretarial approval provided that the revisions do not significantly affect the level or nature of services. See IHS Policy Letter 90-9 at 1. Consistent with the intent of the 1988 Amendments, we recommend that the flexibility of the IHS interim guidelines be incorporated in the final regulations for both Interior and HHS. We note that under Title III substantial flexibility has been accorded to Indian tribes to restructure programs and reallocate funds. In the light of the goals of Title I, we see no rational basis for the much more restrictive approach in the proposed regulations.

We question the agencies' legal basis for concluding that funds, once appropriated and obligated to a tribal contractor, are subject to the same statutory restrictions which govern federal appropriations in the hands of the federal agency. It should not matter that funds are rebudgeted by the contractor to meet unanticipated needs so long as the tribal contractor is "carrying out" the contracted programs and functions in compliance with contract terms.

***Recommended Revision:***

We recommend revising 900.305(a)(6) to read:

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**Rebudgeting as described in subsection 900.305(e) below.**

We recommend also that 900.305(b) be revised to read:

**(b) Within 30 calendar days after receipt of a request from a tribe or tribal organization to approve a contract modification, the Secretary shall review the proposed modification or amendment against the criteria for declination set forth in §900.207. At the completion of the review, the following action will be taken as appropriate:**

**(1) If there are no declination issues, the contracting officer will notify the tribe or tribal organization in writing of this fact and revise or amend the contract within 30 days of issuing the notice.**

**(2) If there are declination issues that must be resolved, the Secretary will notify the tribe or tribal organization of this fact and the extent of the issues, recommend a course of action to resolve the issues and offer technical assistance to resolve the issues within 30 days after issuing the notice.**

**(i) If the tribe or tribal organization accepts the technical assistance, it shall continue in accordance with their request. At such time as the issues are thus resolved the Secretary will so advise the tribe or tribal organization and revise or amend the contract within 15 days of resolution or at their convenience.**

**(ii) If within 30 days, the tribe or tribal organization does not accept or respond to the Secretary's offer of technical assistance and the matter is not otherwise resolved, the Secretary shall decline to modify the contract in accordance with §900.207.**

**(iii) If the proposed contract modification is declined, the tribe or tribal organization may appeal pursuant to subpart N of this Part.**

We also recommend revision of 900.305(e) as follows:

**(e) Rebudgeting. (1) The contractor is expected to carry out the contract within the amount of funds provided. Changes within the total amount provided may be accomplished without approval of the Secretary, unless**

**(i) The change results in a change in the total amount required for the contract; or**

**(ii) The change would result in a change in the scope of the services to be provided; or**

**(iii) The change would impair the contractor's ability to perform the contract at the current funding level; or**

**(iv) The change includes addition to an item of cost which would otherwise require approval of the Secretary; or**

**(v) The change would require a reprogramming of funds by the Secretary from one lump sum appropriation to another.**

**Such rebudgeting shall be accomplished through bilateral modification in order to assure that the Secretary has the information necessary to enable the Secretary to comply with directly applicable appropriations laws. Secretarial approval of proposed rebudgeting under this subparagraph (5) shall only be withheld if the proposed rebudgeting would violate one of the substantive criteria set forth in subparagraphs (i)-(iv).**

b. Procedure (900.305(c)) (3190) -- The proposed regulations do not make clear that the Secretary will apply the declination criteria in approving or disapproving a modification request. Compare 900.305(c) (3191) with 25 C.F.R. § 271.62(b) and 42 C.F.R. § 36.230. However, the cross-reference to 900.205 in 900.305(c) is apparently intended to have that effect.

***Recommended Revision:***

The intent would be clarified by amending paragraph (c) of 900.305 by adding after "§ 900.205" in the first sentence of this paragraph:

**which shall be considered in accordance with §§ 900.206 and 900.207.**

Consolidation of mature contracts (900.306) (3191) -- Consolidation of "mature" contracts should be at the option of the tribal contractor, not discretionary with the agency.

***Recommended Revision:***

In each case the "may" appears in 900.306(a) it should be replaced by "shall".

Contents of Award Document (900.307) (3191) -- In general the content of the award document will look very similar to existing contracts. The proposed regulations, however, provide that in DOI contracts involving trust resources, the contract document must provide "for immediate suspension upon determination by the Secretary that the contractor's continued performance would impair the Secretary's ability to discharge his trust responsibility." This language permits the DOI to circumvent the statutory requirement that the Secretary may only immediately rescind a contract or grant and resume control or operation of a program or service by suspending work without a prior hearing on a finding that there is an "immediate threat to safety". Again, the new regulations are being used as a vehicle to narrow tribal rights in notwithstanding the obviously opposite intent of the 1988 amendments.

The proposed regulations also provide that the Secretary may require revision to the contract scopes of work for trust programs following an environmental impact statement, assessment or other determination which is adverse to the environment or endangered species. The environmental adequacy of a tribal proposal should be handled as a declination matter subject to the mandatory tribal appeal rights. This provision apparently is another attempt to avoid a challenge to its views in an administrative appeal. As a practical matter, tribes will undoubtedly seek to conform their proposals to such environmental determinations in order to assure approval or avoid reassumption.

***Recommended Revision:***

We recommend deletion of 900.307(c) (3191) (immediate suspension of trust resources contract) as it circumvents the requirements of section 109 of the Act.

We also recommend that the matters covered by 900.307(d) (3191) be treated through a bilateral contract modification, that the paragraph be moved to 900.305, and revised to read:

**(d) The Secretary may request such revisions in the statement of work as the Secretary determines to be necessary to avoid violations of statutory law involving jeopardy to an endangered or threatened species; destruction or adverse modification of the habitat of such species; inconsistency with an approved coastal zone management plan; or environmental consequences deemed unacceptable following review of an environmental assessments or environmental impact statement. If the contractor and the Secretary cannot agree to appropriate modifications the contract may be reevaluated pursuant to §900.207, subject to appeal rights under Subpart H.**

Designation as a Mature Contract (900.309) (3192) -- We are concerned that the proposed regulations at § 900.309 do not make clear that non-mature contracts may be for an indefinite period at the request of the tribe with the approval of the Secretary. There is no longer any statutory prohibition on a term contract longer than three years. See 25 U.S.C. § 450j(c). In addition, the definition of "mature contract" states that it may be for a definite or indefinite term as requested by the tribe. Presumably, this means a mature contract may have a fixed term of more than three years. In addition, a tribe which has achieved "mature" status should be able to add new activities to its "mature" contract, without regard to the similarity of the program operation required.

***Recommended Revision:***

We recommend that the word "may" in 900.309(b) be changed to read as follows:

**A new activity shall be added to an existing mature contract at the request of the contractor upon approval of a contract modification for such activity under 900.305.**

**SUBPART D - FINANCIAL MANAGEMENT**

Financial Management (900.402) (3192) -- Section 900.402(b) of the proposed regulations provides that, "when there is other reason to believe that financial mismanagement or misappropriation of funds has taken place," the Secretary may review a contractors' financial management system. The 1990 draft allowed such a review but required that the "reason to believe" be documented. We do not believe a documentation requirement is onerous to the agencies, and recommend that the 1990 language be restored.

***Recommended Revision:***

900.402(b) should be revised to read:

**At any time subsequent to the award, if warranted by unresolved findings in the Single Audit Act of 1984 audit report, or when there is another documented reason to believe that financial mismanagement or misappropriation of funds has taken place; or**

Matching and Cost Participation (900.403) (3192) -- The regulation drafters have taken an affirmative statement in the September 1990 draft regarding the use of contract funds to meet matching or cost participation requirements ("a contractor may use the funds") and turned it into a negative statement ("nothing in this Subpart is intended to prohibit a contractor from using contract funds to meet matching or cost participation requirements under other Federal, State or other programs"). The revised wording appears to insert a level of uncertainty for both contractors and contracting officers not present in the earlier version.

**Recommended Revision:**
We recommend that 900.403 read as follows:

**A contractor may use the funds of a contract to meet matching or cost participation requirements under other Federal, State and other programs.**

Allowable/Unallowable Costs (900.404) (3192) -- In the 1990 draft regulations, the agencies and tribal representatives negotiated exceptions to general rules set forth in OMB Circulars A-87, A-122 or A-21 which would apply in the case of Self-Determination Act contracts. Such exceptions were based on recognition of the principle that the Indian self-determination goals stated in the Act justify different treatment from that accorded state and local governments and non-profit organizations. In 1993 both agencies followed this approach in negotiating compacts under Title III of the Act.

The proposed regulations abandon the principle that the implementing regulations would include such exceptions. Instead § 900.404 leaves contractors to follow the OMB principles set forth in the "applicable circular." We see no rational ground for distinguishing between Title I contracts and Title III compacts on this point.

**Recommended Revision:**
We recommend revising 900.404(b) to read as follows

**The Secretary of the Interior and Health and Human Services within 60 days of promulgation of these regulations, shall convene a group of tribal and federal representatives to consider cost principles which would promote the goals of Indian self-determination. Within six months, the group will issue a report containing its recommendations to Congress, the Secretaries, the Director of Office of Management and Budget, and all federally recognized Indian tribes. The goal of this process is the development of a set of special cost principles consistent with the purposes and goals of Indian self-determination which the Secretaries will promulgate for use by Indian tribes and tribal organizations in connection with self-determination contracts.**

Waiver of Prior Approval Requirements (900.405) (3192) -- The proposed regulations identify automatic data processing; building space and facilities; insurance and indemnification, management studies, professional services and capital expenditures (exclusive of facilities) as allowable costs which are not subject to prior approval of the contracting officer. In the 1990 draft "allowable costs without approval" included, in addition, depreciation and use allowances authorized by law, publication and printing costs and supplemental funding costs. These items should be restored.

Pursuant to OMB Circulars A-87 and A-122 printing, depreciation and use allowances are allowable costs without prior approval. OMB Circular A-21, however, does not specifically address printing costs. Since supplemental funding costs are not addressed in the proposed regulations and are not specifically addressed in A-87, it is not clear whether such costs would now be allowable for contractors to whom A-87 applies. Contractors operating under A-122 and A-21 appear to be prohibited from including these as items of indirect cost.

The complexity of determining which circular applies and which costs would be allowed under each of the circulars, as well as the need -- in certain instances -- for departures from usual cost principles to further the goals of the Act, argue strongly in favor of having a unified set of cost principles for tribal self-determination contractors set forth in the proposed regulations. We urge that the agencies negotiate a set of tribal self-determination cost principles based on the provisions contained in the April 3, 1989 draft (the Yellow Draft).

Indirect Costs (900.406) (3192) -- By making the payment of indirect costs subject to the provisions of § 900.108, the proposed regulations incorporate the "process actually utilized by the Secretary to allocate resources" so that those processes, and not the customary federal indirect cost procedures and the mandatory funding requirements of the Act, will control the determination of the funds to be provided to tribes as indirect costs. The agency processes should be subject to challenge if they fail to assure the level of funding required by the Act. 25 U.S.C. § 450f. We concur with § 900.406(c) which permits the use of temporary indirect cost rates but the agencies should be permitted to approve temporary rates in appropriate cases in advance of receiving indirect cost proposals. We recommend that the restriction ("Subsequent to the receipt of an indirect cost rate proposal") which allows such funds to be advanced only after receipt of an indirect cost proposal be deleted.

The proposed regulations make the Secretary's obligation to provide technical assistance in the preparation of an indirect cost proposal "subject to the availability of resources." (This

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language has been added in Subpart D wherever there is a reference to technical assistance.) It appears expressly designed to provide a regulatory handle to justify the agency in failing to assist less affluent tribes in activities essential to self-determination and it should be removed. Obviously, all federal agency obligations are contingent on congressional appropriations.

A new provision, which appears to be intended to prevent one agency from paying for another's shortfall, requires the negotiation of separate indirect cost rates from each Secretary if a contractor chooses to negotiate on a "fixed with carry-forward" basis. We are concerned that the negotiation of multiple rates may prove impractical and costly. In general, the proposed process for establishing contractors indirect cost rates are overly complex. These provisions should be simplified based on further negotiations with tribal representatives.

Indirect Cost Rate Shortfalls (900.406(d)) (3193) -- The proposed regulations provide that the Secretary has no obligation to fund shortfalls resulting from statutory or regulatory limitations even if such funding is both authorized and appropriated by Congress. Instead, such under-recoveries may be paid "only at the Secretary's option." (Emphasis added § 900.406(d)(4)). We cannot imagine a reason why the Secretary should (or could) be empowered in Departmental regulations to ignore the will of Congress. The proposed regulations should be revised to assure that 638 contractors can take full advantage of Congressional appropriations intended for their benefit.

***Recommended Revision:***
Revise 900.406(d)(4) to read:

**(4) Actual under-recoveries experienced by a contractor due to the failure of any Federal agency to pay the full negotiated indirect cost rate shall be paid by the Secretary to the contractor to the extent specifically authorized and funded by Appropriations Acts, or if otherwise available as a result of unexpended funds in the Secretary's contract support costs budget line item.**

Payment Provisions (900.408) (3193)

a. "Excess Funds" and "Carryover" -- Section 900.408(c) should be revised to make clear that it does not conflict with § 900.111 with regard to tribal carryover rights.

***Recommended Revision:***
In 900.408(c) the phrase "program requirements and" should be deleted and the following sentence should be added:

**This section is intended solely to promote compliance with Treasury regulations and shall not in anyway affect a contractor's entitlement to carryover funding pursuant to 900.111.**

b. Contract Conversions -- Section 900.408(d) allows the Secretary to convert an advance payment contract to a reimbursement payment method based on deficiencies in financial management or administration without any notice to the contractor and with no explicit statement of appeal rights. Obviously, such action can create enormous practical and financial problems for a tribal contractor. It could be tantamount to a contract termination, which by law the agency cannot accomplish without an appeal and a hearing. This attempt to circumvent the statutory reassumption requirements of the Act must be eliminated.

c. Withholding Payment -- Section 900.408(e) would enable the Secretary to withhold funds related to non-compliance with the contract or with regulations. The withholding would be in "an amount of funds which he [the Secretary] estimates to be associated with the area of non-compliance." Such withholding may be tantamount to contract termination for many tribes. The potential breadth of this provision is alarming. There is no express requirement that the agency must notify the contractor that it will withhold the funds. Funds withheld would not be released until "subsequent compliance." Such compliance may be extremely difficult when the agency is withholding the funds necessary to perform the contract. The only procedural protection provided to the contractor for the holding back of funds is an appeal pursuant to § 900.805. Funding may, of course, not be available to cover the costs of such an appeal. Funds needed by tribal organizations to perform self-determination contracts should not be withheld except in accordance with the reassumption procedures. This provision is another clear example of an agency attempt to circumvent the statutory reassumption requirements and violates section 109 of the Act.

***Recommended Revision:***

We recommend that 900.408(d) and (e) be consolidated to read as follows:

**When a contractor is deficient with respect to its administration of advance payments or fails to submit a quarterly financial report within 30 days from the date such report is due, or any extension thereof granted by the Secretary, or has failed to correct an incomplete quarterly report pursuant to a written request from the Secretary, the Secretary shall provide the contractor with technical assistance to correct such deficiency. The**

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**contractor has 30 days from receipt of such notice within which to remedy the deficiency. When a contractor fails to correct such deficiency within 60 days from receipt of such notice, the Secretary, upon written notice to the contractor, may convert the contract(s) to a reimbursement payment method or withhold funds from advances or reimbursements, provided, however, that such notice shall advise the contractor that it has 30 days within which to appeal the notice under Section 900.805. If an appeal is filed within 30 days, the Secretary shall take no action to convert the contract to a reimbursement payment method until the appeal is resolved.**

Program Income (900.409) (3194) -- We are pleased that the proposed regulations define "program income" more comprehensively than in present IHS guidelines and allow its retention by the contractor and expenditure for the general purposes of the contract and that "program income" may not be used as an offset or limitation on funding provided to the contractor by the Secretary. However, a statement included in the 1990 draft which made clear that there "are no federal requirements governing the disposition of program income earned after the end of the contract period" has been eliminated. There is no explanation of this change. We do not think that this question should be left in doubt.

**Recommended Revision:**
Add the following sentence at the end of 900.409(d):

**There are no federal requirements governing the disposition of program income earned after the end of the contract period.**

Reporting (900.410) (3194) -- Major changes from the 1990 draft have been made with regard to reporting requirements. One of the most significant changes is the inclusion of a provision requiring the submission of program data in accordance with Subpart N (see discussion below) by IHS contractors. Other changes require contractors to supply detailed, categorical cost data on a quarterly basis. The financial reporting required under § 900.410 of the NPRM would be substantially more detailed than is required at present. Apparently, it is based on the view that the agencies must report to Congress by budget sub-sub-activities on tribal expenditures. We think the agencies need only report on their contract awards by budget category and are not required to oversee tribal expenditures like a "nanny" provided tribes perform their contract obligations. See IHS Policy Letter 90-9.

**Recommended Revision:**
We recommend deletion of subparagraphs 900.410(a) and (c).

Audit (900.411) (3196) -- Language from the 1990 draft under which an audit report is deemed accepted after the passage of 60 days unless the Secretary provides notice of rejection has been eliminated. Also, a new subsection providing that "Resolution of the audit report's findings and recommendations is the responsibility of the contractor and the audit resolution agency." has been substituted for a statement included in the 1990 draft that such resolution is the Secretary's responsibility.

We object to these changes, especially the elimination of the 60-day deadline for agency action.

***Recommended Revision:***
At the end of 900.411(c) add:

**A report not rejected within 60 days shall be deemed accepted.**

**We also recommend replacing the words "audit resolution agency" and "audit resolution official" found in 900.411(d) and (e) (3194) with "Secretary." These terms are not defined or used elsewhere in the NPRM.**

Close-out (900.412) (3196) -- The manner in which the proposed close-out requirements will apply in the case of "mature contracts" for an indefinite term is puzzling and should be clarified. The proposed provisions suggest that the status of "mature contracts" has not been addressed in the context of close-out. If a procedure analogous to close-out is to be applicable in the case of "mature contracts", which have an expiration date, it should be described carefully in the regulations.

Collection of Amounts Due (900.413) (3195) -- This provision would allow the federal government to make an offset or withhold advances against other funds, when it is "finally determined" that a contractor has received excess payments under a closed-out contract. Even if the contractor disputes the federal government's conclusion that there have been excess payments, the offset or withholding provisions are operative and interest would run on the debt despite the pendency of an appeal or other litigation. We recommend that, in case of a dispute, the determination of whether a debt to the federal government exists be made at a higher level than the contracting officer, prior to the federal government being able to use the offset remedy or charge interest on the debt. The offset remedy should be subject to resolution under the Contract Disputes Act.

***Recommended Revision:***
The first phrase of the second sentence of 900.413(a) (3195) be revised to read:

**Unless a dispute pursuant to 900.407 has been commenced by the contractor regarding the amount due hereunder, the Federal agency may, 90 days after making a written demand for payment of the contractor, reduce the debt by:**

**SUBPART E -- PROPERTY MANAGEMENT**

Federally-owned Personal Property (900.502) (3195)

A clarification is needed in Sec. 900.502(c) which, by its own terms, refers to the use of federally-owned personal property. Paragraph (2) sets out procedures for management of certain personal property "whether or not acquired in whole or in part with contract funds". If the Secretary takes title to property purchased with contract funds, then it is federal property and those procedures should be followed. If, however, the contractor takes title, it is not federally-owned, and subsection (c) does not apply.

***Recommended Revision***

**900.502(c)(2) -- Procedures for managing personal property with an acquisition value of $1,000 (including replacement property), including such property acquired in whole or in part with contract funds to which the Secretary holds title, until disposition takes place will, as a minimum, meet the following requirements: *****

Property Purchased with Contract Funds (900.503(a)) (3196) -- We are pleased that the agencies have reversed their prior position and now agree that contractors may take title to personal property purchased with contract funds. But the proposed regulation does not allow contractors the choice of whether to take title or not. The proposed regulations now read that the contractor "will take title to all personal property purchased under the contract." Providing the option for the contractor to choose is consistent with the concept that donation should be acceptable to the donee, as reflected in rules issued under the Act. See IHS Memorandum No. 90-12, September 6, 1990.

***Recommended Revision***

**900.503(a) -- Title to personal property purchased with contract funds. The contractor shall have the option to elect to take title to or have the**

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**Secretary take title to all personal property purchased under the contract.**

Note that the minimum requirements for managing contractor acquired personal property are set out in 900.503(d). There is no reason why the contractor should have to maintain two sets of records on the same property.

We object to the uneven manner in which contractor acquired personal property is treated regarding funds for replacement as well as maintenance and repair. We concur with the 900.503(e)(2) provision that contractor property will be eligible for replacement funding on the same basis as federally-owned property. But the same treatment is not afforded to contractor acquired property in (e)(3) with regard to maintenance and repair funds. Section 811 of the Indian Health Care Improvement Act, 25 USC §1680a, requires equal funding treatment for tribally-operated and IHS-operated health care programs. This policy extends to "any ... expenses relating to the provision of health services", which, in our view, includes equipment maintenance and repair funding.

Section 900.503(f) regarding disposition of contractor acquired personal property is especially onerous. Paragraph (2) says that when such property with a value in excess of $5,000 is sold, "the awarding agency" is to share in the proceeds of sale in a percentage that represents the agency's contribution. If the contractor elected to take title to such property when acquired, why would the "awarding agency" be considered to have an interest in that property? If the property was purchased totally with contract funds, is the "awarding agency's" interest considered to be 100%? If yes, the whole concept of vesting title in the contractor is rendered meaningless. This approach would deprive the contractor of the ability to utilize the proceeds of the sale of used equipment to expedite replacement.

**Recommended Revision:**

After "replacement" in (e)(2), insert "and maintenance and repair."

Paragraph (f)(2) should be deleted and (f)(1) revised accordingly.

Property Donation Policy (900.504 -- personal property (3196) -- 900.511 -- real property (3198)) -- The proposed regulations define "excess" property (both personal and real) as property under control of IHS or BIA "that is not required for its needs and the discharge of its responsibilities." But the proposal places a significant limitation on donation by asserting that "property will not be considered as excess to the BIA or IHS by virtue of the execution of a contract which calls for performance by the contractor of the activities in which the [personal or real] property was previously used." (emphasis added) §§900.504(a)(1); 900.511(a)(1).

Tribal representatives had encouraged the agencies to establish a pro-tribal property donation policy as the approach more in keeping with the spirit of Sec. 105(f) of the Act, but the agencies were concerned about donating property that might later be needed for program operations in the event of rescission or retrocession. To answer this concern, tribal representatives urged the policy that is now set out in 900.512; this allows the Secretary to re-acquire previously donated property used in a contracted program if the Secretary must resume direct program operation.

We do note that the limiting language quoted above is carefully crafted to convey the idea that just because property is to be used in a contracted program, it does not *automatically* follow that the property is excess to the Secretary's needs. By the same token, such property is not *automatically* excluded from the category of potentially donable property. It sounds as though the drafters desired to leave some room for the donation of property used in a contracted program.

Frankly, we do not believe the limiting language is needed to protect the Secretary in the event of rescission or reassumption, and recommend that it be deleted. The regulation should make clear that such property can be considered for donation and describe what justification the requesting contractor would be required to proffer. If history is any guide, the language, as written, will be "over-interpreted" by federal personnel as totally prohibiting the donation of property used in the contracted program, and contractors will not even be given the opportunity to make a persuasive case.

### Recommended Revision

Delete second sentence of 900.504(a)(1) and 900.511(a)(1). Or amend both provisions to provide guidance on when property used in a contracted program will be considered "excess" and eligible for donation.

In three places, the regulations wisely require the Secretary to periodically provide contractors with lists of excess property. See 900.504(a)(2) regarding reporting excess IHS and BIA personal property; 900.511(a)(2) regarding notification of excess and surplus IHS and BIA real property; 900.511(b)(2) regarding reports on other Federal excess and surplus real property. With regard to a list of other Federal excess or surplus personal property, however, the regulations would require the contractor to ask. It would seem more efficient from all perspectives if the agencies routinely supplied lists to all contractors instead of having to respond to individual inquiries filed throughout the year.

***Recommended Revision***

**900.504(b)(1). The Secretary shall periodically furnish to contractors listings of excess and surplus personal property from all Federal agencies to the extent available.**

Contractor provided real property (900.510) (3198) -- We object to the continued position of the agencies that the Secretary will not negotiate a separate lease with a tribe which owns a facility in which it operates a contracted program. The Secretary of HHS has express statutory authority to lease space from a tribe for a program either the Secretary or the tribe will operate. 25 USC §1674. IHS exercises this authority, but only when the Secretary will directly operate the program performed in the facility leased from the tribe. This disparate treatment produces an obvious chilling effect on contracting. The more logical action for implementation of a rational Indian self-determination policy would be to enable the same activity to occur under tribal operation of the program.

Neither agency has ever expressly described the basis for its policy against leasing space from the tribe for tribal operation of the program. To the extent the agencies believe the standard cost principles in OMB Circulars A-87, A-122 or A-21 preclude even arms-length leases with tribes for tribally-operated programs, the need to reinstate the ISDA-specific cost principles advocated by tribes is underscored. (**See** commentary on Subpart D, above.) The earlier draft regulations negotiated with tribal participation set out several Indian tribal-specific cost principles, including one on leasing of tribally-owned facilities, that tribes believe are needed to properly implement the objectives of the ISDA.

This issue directly impacts the ability of many tribal contractors to deliver services to Indian beneficiaries. The agencies must cease their unexplained and unyielding posture of refusal to work with tribes on this issue. If the agencies believe there are statutory or regulatory impediments to agency leasing of tribal facilities where the tribe operates the program, an analysis should be supplied to tribes and to Congress so that orderly examination, and possibly revision, can be considered.

Lease of real property with contract funds (900.510(c)) -- The regulations provide different leasing policies for the two agencies. BIA contractors would be permitted to lease real property as they deem necessary for contract operations. IHS contractors, however, would have to apply for approval of leases under the IHS Lease Priority System. IHS, under this system, as a matter of policy, will not lease a tribally-owned facility when the tribe operates the program itself, as noted above.

Presumably the more limited IHS policy was based on the language previously included in the IHS section of the appropriations act which required IHS to file quarterly reports with the Appropriations Committees regarding proposed leases of additional space for Indian health care delivery. See, e.g., P.L. 102-154, 105 Stat. 1027 (FY92 Interior and Related Agencies Appropriations Act, Administrative Provisions for Indian Health Service). This provision has been removed. The FY94 Appropriations Act does not contain a requirement that IHS report to Congress on any proposed new leasing. See P.L. 103-128, 107 Stat. 1409 (FY94 Appropriations Act, Administrative Provisions for Indian Health Service). Thus, the need for advance reporting of new leases no longer exists.

The problems faced by tribal contractors are not cured by the recent change in IHS policy regarding the provision of funds to contractors in the form of "space allowances" or "use allowances" for tribally-owned facilities. Even though these "allowances" are no longer limited to the square footage utilized only by primary care providers (the previous IHS policy), tribal contractors report they are still inadequate to meet operation and maintenance costs. This underscores the need for a more appropriate leasing policy.

***Recommended Revision***
Delete paragraph (2) of §900.510(c), and amend paragraph (1) thereof to include coverage for IHS contractors.

Use of Medicare/Medicaid Funds (900.510(d)) (3198) -- This provision prohibits contractors from using M+M collections for facilities renovation, lease or purchase without prior approval of the Secretary of HHS. We presume this policy is based on the agency's belief that it must oversee use of M+M funds to assure they are used for the statutorily-established purpose: to attain or maintain JCAHO accreditation.

We believe the spirit and objectives of both the Indian Health Care Improvement Act, which contains the restrictions on use, and the Indian Self-Determination Act are best served by allowing Indian tribal contractors maximum autonomy to carry out the purposes for which the M+M funds are made available. We propose that a tribal contractor which desires to use its M+M funds submit a proposal to the Secretary. If the Secretary does not disapprove the proposal within a specified period (perhaps 30 days), the project would be deemed an approved use for M+M funds, and the contractor could go forward to carry out the proposed action. This procedure could greatly facilitate the use of M+M funds for the purposes intended by Congress.

Operation + Maintenance Funding for Donated Real Property (900.511(a)(8)(ii) (3198); 900.511(b)(4) (3199) -- These sections state that upon acceptance of title to donated real estate from BIA, IHS or other agencies of the federal government, the contractor shall be solely responsible for the operation and maintenance of that property from within "available contract funds". Presumably, this means from within "existing contract funds" and that the contractor will not be eligible for additional O+M funding.

We object to this policy. By its own terms, the regulation requires that any donated property must be used in a self-determination contracted program. Yet the contractor would not be supplied with additional contract funds for the operation and maintenance of that building, funds that are necessary to enable the building to be used for the program and to carry out the contract. This appears designed to discourage the exercise of this option. More significantly, it violates the express requirement of section 811(1) of the Indian Health Care Improvement Act that funds for the maintenance and repair of clinics owned or leased by tribes or tribal organizations "on the same basis as such funds are provided to programs and facilities operated directly by the Service."

***Recommended Revision***

**900.511(a)(8)(ii) The donated real property shall be eligible for operation and maintenance funds to the same extent as if the Secretary owned the property.**

**900.511(b)(4) [last sentence] The donated property shall be eligible for operation and maintenance funds to the same extent as if the Secretary owned the property.**

Staff Quarters Construction (900.513(c)(2)(iii)) (3199) -- The proposed regulations provide that the contractor submit to the Secretary any request for major renovation, expansion, replacement or new quarters construction "for legislative review and approval." We, of course, do not object to the review of such requests by Congress. We do believe, however, that the regulations should also require that the evaluation of such requests by the Secretary, in the first instance, should be based on the needs of the contractor in carrying out the contract and priorities established by the recognized tribal governing body or bodies and evaluated against federal criteria applicable in the case of construction projects administered directly by the Secretary.

***Recommended Revision***

Add as a final sentence to Sec.900.513(c)(2)(D)(iii)

**The Secretary shall evaluate such requests on the same basis and pursuant to the same criteria as if the quarters were operated by the Secretary.**

**SUBPART F - PROCUREMENT MANAGEMENT**

Procurement System Standards (900.602) (3200) -- While the proposed regulations permit tribal contractors to develop their own procurement system subject to federal approval, formal procedures assuring federal action when procurement procedures are submitted for review within sixty days contained in earlier drafts have been removed. These provisions should be restored and appeal rights consistent with the declination criteria should be assured. The paternalistic involvement of the federal government in overseeing tribal procurement systems, which is inimical to tribal sovereignty, should be eliminated.

***Recommended Revision:***

We recommend deleting the existing 900.602(c) regarding a contractor's right to opt for an alternative procurement system and replacing it with the following:

**(1) A contractor may, at any time, elect to procure property pursuant to its own procurement procedures. If the contractor elects to use its own procurement procedures, it shall notify the Contracting Officer and provide a copy of its procurement procedures to the Contracting Officer.**

**(2) If the Contracting Officer believes that the contractor's procurement procedures do not meet the requirements of this Subpart F, the Contracting Officer may request appropriate changes and shall offer technical assistance to the contractor. Disputes which arise regarding the adequacy of a contractor's procurement procedures which cannot be resolved shall be resolved in accordance with the appeal procedures set forth at §900.805.**

Procurement from Indian Organizations - (900.605) (3201) -- It should be made clear in this section that a 'tribal preference' is allowable as long as 'Indian preference' is required before an award is made to a non-Indian business. See discussion under § 900.115. The provisions requiring burdensome compliance with small or minority-owned or labor-surplus area preferences (see § 900.605(b) and (c)) should be eliminated. These requirements have not been previously imposed on '638' contractors and the agencies should not use this opportunity to limit tribal autonomy in such matters. While the goals of these FAR requirements may be commendable, it is inappropriate for the federal government to impose its priorities in these matters on tribal governments which are entitled to develop their own policies, as sovereign governments, on preference for small firms, minority firms and women-owned firms.

**Recommended Revision:**

Insert after 'Indian preference requirements' in 900.605(a):

**(including a preference based on tribal affiliation)**

Delete paragraph 900.605(b)

Procurement Award Provisions (900.608) (3201) -- Contrary to the long-standing rule of the Bureau of Indian Affairs which has exempted Indian tribes acting as subcontractors under a contract from the provisions of the Davis-Bacon Act, the proposed regulations appear to make no such exception as to the applicability of the Davis-Bacon Act. See 25 C.F.R. 271.43. The proposed regulations require that laborers and mechanics employed by subcontractors be paid prevailing wages 'as determined by the Secretary of Labor in accordance with the Davis-Bacon Act.' No mention is made of the 1972 opinion of the Solicitor for the Department of Labor which concluded that Indian tribes and tribal governmental entities are exempt from Davis-Bacon. The September 1990 Joint Draft made clear that Davis-Bacon applies to all procurements 'with other than tribal organizations' which exceeded $2,000. This language should be restored. See below for discussion of Davis-Bacon provision in Subpart J.

**Recommended Revision:**

Insert after 'subcontractors' in paragraph (k) the words

**(other than Indian tribes and their instrumentalities).**

**SUBPART H - APPEALS, DISPUTES**

IHS Appeals on Funding Allocations (900.802) (3202) -- Despite the objections of tribal representatives, the IHS has distinguished funding appeals from other appealable matters. Under the proposed regulation, the IHS limits the issue to whether the Secretary's funding allocation for the contract was properly reached using existing IHS "allocation processes." If a tribe requests more funds than the Secretary determines are available, it may request an informal hearing (discussed below) or file an appeal to the Contract Funding Appeals Board (FAB). The FAB is composed of five members, all of whom are appointed by the IHS Director. The proposed regulations are silent on the qualifications of the FAB members, whether they are selected at the Area or Central Office level, whether they are to be a permanently standing board and whether they must be wholly disinterested parties who have had no prior dealings with the appellant.

The FAB will consider the appeal, conduct a hearing, if requested, and recommend a decision to the IHS Director or his representative, whose decision shall be final. The regulations do not require an "on the record" hearing under the Administrative Procedures Act although section 102 of the Act clearly requires such a hearing when a contract proposal is not approved (i.e., when it is "declined").

We strongly object to the fact that the Director has the final say in this matter, rather than a DHHS official with less of an apparent conflict of interest. The IHS Director or his immediate staff are usually consulted before any Area Office declination decision, including those based on funding. The IHS procedures now proposed deprive Indian tribes of the meaningful appeal and hearing rights mandated by section 102 of the Act. In failing to treat a dispute over funding as a declination, they conflict with the existing regulations (42 C.F.R. § 36.212).

Appeals on the following matters are all made subject to the "due process" procedure mandated by the Administrative Procedures Act.

1. Declination to make, amend or modify an award;
2. Rescission of the award and reassumption of the program;
3. Denial of mature contract status;
4. Whether all required the resolutions are present;
5. Whether the activity is contractible;

6. Declination of construction contracts.

There is no legal basis for handling funding appeals differently, and we urge that IHS accept the plain mandate of section 102 under which a 'due process' hearing must be provided on any objection raised to a self-determination proposal submitted at the request of an Indian tribe. The legislative history is very clear on this matter:

> The burden of proof for declination is on the Secretary to clearly demonstrate that a tribe is unable to operate the proposed program or function. The intent of the Committee in retaining the declination criteria and the declination process is to insure that denials of requests for self-determination contracts are handled only through the declination process.

Sen. Rep. No. 100-274, 24 (1987).

***Recommended Revision:***

We recommend deletion of 900.802(a) in its entirety. Conforming amendments should be made throughout the NPRM.

We also recommend that subparagraph (f) of 900.802 pertaining to the initial determination by the Board be revised to read as follow:

**(f) Initial determination by the Board.**

**(1) Within five days of its receipt of the tribal organization's notice of appeal, the Board will determine whether the appeal is within the scope of paragraph (b) of this section and so notify the parties provided that, if the Board is unable to make a determination from the information included in the notice of appeal, the Board may request additional statements from the tribe or tribal organizations and IHS. If additional statements are required, the Board will make a determination within five days of its receipt of the statements in accordance with paragraph (g) of this section.**

We also note a curious difference in the appellate procedure for emergency and non-emergency reassumptions. Under 900.802(i) in the case of a non-emergency reassumption, exceptions to an Administrative Law Judge's decision go straight to the Assistant Secretary for Health, as it should, to avoid involving the IHS Director in a possible conflict of interest. In the case of emergency reassumptions, under 900.802(j), such exceptions are filed with the IHS Director. Paragraph (j) should be revised to conform to paragraph (i) on this point.

Interior Appeals Process (900.803) (3204) -- Unlike the IHS, Interior is willing to grant a "due process hearing" on funding matters, although its representatives have denied that the law requires that result. See § 900.803(a)(2) and (f) (p. 3204-05). The inconsistency between the IHS and Interior positions is puzzling. However, the Interior appeal provisions are extremely complex and, as presently written, contain many pitfalls for the unwary tribe.

If the tribe fails to request a hearing on the record when it files its notice of appeal, it loses its right to appeal. In the case of appeals from decisions by Interior agencies other than the BIA, appeals go, not to the Board of Indian Appeals (which presumably has expertise in "638" matters), but to an "Ad Hoc" board appointed by the Director, Office of Hearings and Appeals. The "waiver" language should be eliminated and all appeals should go to the Board of Indian Appeals which clearly has the most expertise in matters involving the Indian Self-Determination Act and other laws relating to Indian tribes. It makes sense to have one administrative body be the repository of expertise in disputes involving self-determination contracts.

The regulations should make clear that a tribe which requests an "on the record" hearing will get one. A decision not to hold a hearing should only occur if neither the statute nor the regulations authorize a "due process" hearing and the regulations should make clear that a hearing will be held, if requested, and the subject matter is not plainly outside the scope of § 900.803.

We recommend that Interior meet with tribal representatives to simplify the appeal procedures as much as possible without sacrificing tribal rights.

***Recommended Revision:***
Section 900.803(6) should be revised to read:

**Whether the tribal or tribal organization has the required resolutions of approval from the tribes it proposes to serve under section 4(e) of the Act and 900.203 of these regulations.**

Equal Access to Justice Act (900.804) -- Under § 900.804 the Equal Access to Justice Act applies to administrative appeals involving non-discretionary awards under the Act. This implements section 110(c) of the Act. As noted previously, Subpart D should be revised to clarify that contract funds may be used for legal

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advice in prosecuting such administrative appeals. We find no inconsistency in the statutory right of a tribe to obtain EAJA reimbursement for legal costs of administrative appeals if the EAJA conditions are met but, in any event, being able initially to utilize contract support funds for legal advice in connection with such appeals up to a final departmental decision. The agencies have adopted this principle in self-governance compacts negotiated under Title III and so should have no objection to applying it in the case of Title I contracts.

In addition, the EAJA does not allow recoupment of fees in excess of $75 an hour in a Board of Contract Appeals award absent express authorization in agency regulations. Since tribes are unlikely to be able to obtain adequate counsel at this rate, we recommend that such authorization be included in the regulations for both Departments.

***Recommended Revision:***
We recommend that 900.804(b) read as follows:

**(b) The EAJA claims for DOI will be handled under regulations at 45 C.F.R. part 13, provided that attorney fees in excess of $75 per hour may be awarded if an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.**

Post-Award Contract Disputes (900.805) (3206) -- This provision is acceptable. We are pleased that it provides that the Contract Appeals Board must give consideration to the factual circumstances "without rigid adherence to strict accounting principles."

## SUBPART I - LIABILITY INSURANCE AND FEDERAL TORT CLAIMS ACT COVERAGE

We urge the agencies to revise these regulations to precisely inform tribal contractors on the scope of Federal Tort Claims Act coverage, including the limits of that coverage, presently made available to contractors under Pub.L. 93-638. This is essential so that contractors may make informed decisions as to additional insurance protection required. This should be relatively easy since both the IHS and BIA have, in other memoranda referenced below, provided greater clarity on the scope of coverage available to P.L. 93-638 contractors.

Liability Insurance and FTCA Coverage (900.901) (3207) -- This section restates the language in the Act which required the Secretaries, beginning in 1990, to be "responsible for obtaining or providing [general] liability insurance or equivalent coverage, on the most cost-effective coverage for Indian tribes, tribal organizations, and tribal contractors carrying out contracts," under the Act. To date, the Secretaries ha not obtained national insurance coverage for P.L. 93-638 contractors.

Unlike current regulations, the proposed regulations (900.901(f)) state that the cost of insurance "beyond that provided by any national insurance plan ... or for the responsible or businesslike operation of a contract ... shall be a valid cost to the contract."

Because of the failure of the Secretary of the Interior to comply with the statutory requirement to obtain general liability insurance coverage for 638 contractors, Congress has permanently extended the protections of the Federal Tort Claims Act (FTCA) to P.L. 93-638 contracts, and their employees when acting within the scope of their employment in "carrying out" the P.L. 93-638 contract. FTCA coverage for medical-related claims was extended to 638 contractors and their employees in December, 1987.

**Recommended Revision:**
The reference to the term "State" in 900.901(d)(1) should be changed to "jurisdiction."

Medical-related FTCA provisions (900.902) (3208) -- Paragraphs (a) and (b) of this section set out the scope of FTCA coverage provided under Section 102(d) of the Act regarding medical-related claims. Paragraph (c) elaborates, with a non-exhaustive list, upon the meaning of the phrase "medical, surgical, dental or related functions" included in Act. Paragraphs (d) and (e) explain: (1) who may bring a claim; (2) how such claim must be filed, and (3) what a contractor or employee should do upon receiving a complaint or claim. Paragraphs (f), (g) and (h) of this section elaborate upon the scope of FTCA coverage to tribal employees when: (1) treating non-beneficiaries at a non-contract facility (reciprocal medical services); (2) providing health services funded from sources other than under a 638 contract, and (3) treating non-beneficiaries at the contract site.

**Recommended Revision:**
**We recommended that three specific clauses, designed for inclusion in a "638" contract and set out in IHS ISDM 92-1, should be incorporated into this subpart. They state in plain language the scope of FTCA coverage.**

Non-Medical Related FTCA Provisions (900.903) (3209) -- This section deals with non-medical related FTCA coverage and is not as detailed or informative as the medical related coverage section.

We do not believe the statement that non-medical FTCA coverage "varies from time-to-time," without more, is very instructive. If, as stated in Section 900.904 (which immediately follows the non-medical related FTCA coverage sections), the Secretaries "shall provide a statement verifying any coverage by the FTCA" to each tribal contractor, and where evidence of insurance is required by law and where the FTCA applies, the Secretaries "shall provide an appropriate certificate or statement as required by such law," the agencies should include such statements in the regulations. To the extent possible, the agencies should spell out in the regulations what is and what is not covered by the FTCA (e.g., in the introduction to the regulations (59 Fed. Reg. 3172), the agencies note that workmen's compensation and fire and casualty are two insurance requirements not covered by the FTCA).

Notification to Government of Action Filed Against Recipient (900.905) (3209) -- This section sets out additional procedures with which a contractor must comply (i.e., notification to government of a claim) to ensure the FTCA coverage is not lost.

The agencies must do more to clarify, to the greatest extent feasible, the extent and limitations of insurance coverage made available to P.L. 93-638 contractors as presently exists under law. As early as July 30, 1990, Eddie Brown, then Assistant Secretary, Indian Affairs, issued a memorandum to Area Directors on FTCA coverage provided under Pub.L. 93-638 to provide guidance on the scope of FTCA coverage and to assist tribal contractors in negotiating lower general liability premiums (to cover those incidents which may fall outside the scope of FTCA) with private insurance carriers in light of the coverage provided by the FTCA.

The memorandum made clear that punitive damages, subcontractors, damages to buildings, on-the-job injuries to FTCA-covered employees (covered by workmen's compensation), libel and slander, statutory exemptions, and constitutional torts, were not covered by the FTCA. We believe that provisions with the clarity and specificity of this memorandum and IHS ISDM 92-1 should be incorporated into these regulations.

## SUBPART J -- CONSTRUCTION CONTRACTS

Subpart J is clearly designed to enable the federal construction bureaucracy to retain control over the manner in which federally-funded construction projects for the benefit of Indians are administered. We doubt whether allowing tribes a right of first refusal to design and build facilities in accordance with the usual FAR-controlled procedure employed by the federal government for in-house construction is what Congress intended when it made crystal clear that P.L. 93-638 extends to "construction". The Act charges the Secretaries with the responsibility to tailor the Self-Determination construction regulations to achieve the goals of the Act. They have failed to do so, and Subpart J needs to be completely revamped.

It is well known in Indian country that the cumbersome and bureaucratic federal construction procedure is failing to meet the need for new educational and health facility construction and for renovation and repair. Delays and bad planning (for example, flat roofs on hospitals in regions with heavy snowfalls) enforced by federal procedures impair the ability of the federal government to assist tribes in meeting their tribal facility construction needs, even when funds become available from Congress. We urge that federal representatives (independent of the federal construction bureaucracy which has its own interests to protect) sit down with tribal officials and staff with construction experience and re-invent Subpart J.

Our comments below address specific objections even if it is assumed that the fundamental concept of a tribe's right of first refusal is all that was intended.

Purpose and Scope (900.1001) (3209) -- The third sentence of this section states that Architect/Engineer (A/E) services, as defined in FAR 36.102, may be included as construction projects subject to the requirements of subpart J. A/E services which do not involve substantial construction activities should not be subjected to burdensome FAR requirements. See also comments below to § 900.1011.

***Recommended Revision:***
We recommend revising 900.1001(a) to read as follows:

**(a) This subpart establishes requirements for the design, construction, repair, improvement, expansion, or demolition of one or more Federal facilities. In addition, it shall apply to tribal facilities where the Secretary is authorized by law to design, construct and/or renovate such tribal facilities. These requirements include architect-engineer services when rendered in connection with an actual facilities construction project where the value of such services is in excess of $25,000 and dismantling/demolition services as defined in 48 CFR 37.300.**

Second, the last sentence in this section gives the Secretary the discretion to include in construction contracts procurement of moveable equipment, furnishings including works of art and special purpose equipment, when such procurements are part of the underlying construction contract. This provision contains no

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guidelines for the Secretary's exercise of discretion and does not explain whether or how a contractor can request or object to the inclusion of such provisions in the contract.

Finally, under the proposed language it is unclear whether Housing Improvement Program (HIP) contracts and road maintenance contracts would be subject to subpart J's provisions. Language specifying that HIP contracts and road maintenance contracts are not construction contracts within the meaning of subpart J and are not subject to any federal acquisition regulations should be added either in Subpart J or in the definition of "construction". The effectiveness of the streamlined program to assist in the rehabilitation of Indian housing would be severely impaired by the imposition of the FARs. We are informed that agency staff have assured tribal representatives that this change will be made but we have seen nothing in writing.

General (900.1002) (3209) -- This section states that construction contracts, unlike other self-determination contracts, are procurement contracts which, pursuant to § 105(a) of the Self-Determination Act, as amended, are subject to the FAR and agency supplemental acquisition regulations, including amendments, unless waived by the Secretary.

Section 105(a) of the Self-Determination Act does not provide that construction contracts are procurement contracts. It simply provides that they are not exempt from the FAR provisions. The legislative history of the Act clarifies Congress' intent because it provides that construction contracts are akin to procurement contracts, not that they are procurement contracts. Thus, referring to construction contracts as procurement contracts and making all the FARs applicable, unless waived by the Secretary, is inconsistent with the Act and its legislative history.

A long matrix of FAR clauses, Exhibit I, is included in the proposed regulations to identify applicable FAR solicitation provisions and contract clauses. Since preceding language states that all FAR and supplemental regulations are applicable unless waived, we are concerned that contracting officers may be confused regarding the applicability of FAR and other regulations not specifically mentioned in Exhibit I.

We have reviewed the FAR clauses included in the matrix. Groups of these clauses relate to subject matters which should be left to the decision-making of Indian tribes, rather than being governed by federal mandates. For example, some thirty-three required clauses establish various types of preferences with which Indian tribes would be required to comply, such as affirmative action for Viet Nam veterans and handicapped or disabled persons, preferences for small and disadvantages businesses, labor surplus areas, women-owned businesses, and equal employment opportunity requirements. While these public policies may all be commendable, the issue is whether these are matters which Indian tribes should be able to decide for themselves or whether they should be decided for them by the federal government.

Other clauses impose complex and burdensome financial record-keeping and cost-accounting standards; highly elaborate competitive bidding procedures; change provisions, including termination for convenience of the government clauses, which are in flat contradiction to the provisions of the Act prohibiting unilateral modification and requiring due-process when a "638" program is re-assumed; damages clauses which violate tribal sovereign immunity and provisions allowing the federal government to cut off funding without complying with the re-assumption provisions of the statute.

On the other hand, many of the FAR clauses provide useful guidance, and tribal organizations engaging in construction would probably have no problem with voluntarily agreeing to include them. The FAR clauses need a thorough review to eliminate those which are either inconsistent with the statutory provisions, with the tribal sovereign status and the government-to-government relationship, or are unnecessary to assure protection of the federal government's obligations to the Indian beneficiaries of self-determination construction projects.

***Recommended Revision:***
This section should be revised to read:

**In accordance with § 105(a) of Public Law 93-638, as amended, self-determination construction contracts are not procurement contracts and are not subject to Federal Acquisition Regulations or Agency Supplemental Acquisition Regulations, except as otherwise expressly provided herein.**

In addition, the matrix needs stringent review and revision as recommended above.

Section 900.1002(b) -- This sub-section lists the provisions of other sections that are applicable to construction contracts. The regulation erroneously refers to subsections 900.802(b)(6) and 900.802(c)-(j) of subpart M as 900.801(b)(6) and 900.801(c)-(j), and should be corrected.

Consultation on Facilities (900.1003) (3210) -- This provision requires the Secretary to consult with affected tribes prior to entering into construction contracts for design, construction or renovation of facilities. This language omits the requirement that the Secretary consult with affected tribes prior to entering into contracts for "planning" purposes. Consultation prior to planning a project should be required. The involvement of tribes in the planning of schools, health facilities and other federally-funded constructions on their reservations is absolutely essential if the federal Indian self-determination policy is really applicable to construction.

Contract Process (900.1004) (3210) -- This section establishes a tribal right of first refusal and requires that, if a project benefits more than one tribe, a notice of intent to contract must include authorizing resolutions from all tribes benefitted. This requirement may create significant problems for tribal organizations sanctioned by a number of tribes which seek to contract construction of multi-tribe facilities as, for example, in Alaska.

Section 900.1004(c) sets forth two alternative procedures which are to be followed by Interior and IHS when a notice of intent to contract has been received. Both procedures are in need of revision.

This section to some extent reflects compromises worked out with tribal representatives as to the manner in which "638" proposals for construction will be handled. The provision to give benefitting tribes a right of first refusal is to assure that the requirements of the Act are met in the event a benefitting tribe elects to exercise its right to contract under section 102. If a tribe does not provide a notice of intent supported by resolutions from all benefitting tribes within thirty days, it loses its "638" rights. We think thirty days is too short. We also think that, in the case of a construction project benefitting multiple tribes, a negotiation or competitive process among those tribes electing to contract is more consistent with the Act than barring any "638" contract unless all tribes support it.

In addition, the award and declination procedures as described in § 900.1004 are confusing and their relationship to § 900.207 and subpart H is impossible to determine. We assume that (c)(2) governs IHS procedures (as (c)(1) governs DOI procedures), but it does not say so. Under DOI procedures, a proposal may be declined if it fails to meet "the requirements of the government." Under IHS procedures a declination appeal is "confined to the issue of whether the proposal meets the requirements of the RFP." This is better, but we fail to see how either the DOI or the IHS procedure is consistent with the plain language of section 102 of the Act. We think this provision needs further careful negotiation to assure that the statutory declination standards are applied to construction proposals and that tribes are clearly put on notice in the regulations as to their appeal rights. The Secretaries should be required to respond to requests for technical assistance.

***Recommended Revision:***

We recommend amending 900.1004(a) to change 30 days to 45 days. We also recommend that the phrase "as expressed in the POR" be added to the last sentence of 900.1004(c)(1) (3210).

Award (900.1006) (3210) -- This paragraph describes what types of contracts may be awarded, without specifying who has the right to decide what type of contract should be awarded and on what basis such a decision should be made. Criteria similar to those contained in § 900.1004(c)(2)(ii) should be employed in determining the type of contract awarded and should be included in this provision.

Section 900.1006(c) states that the type of award document which is appropriate is prescribed in the "FAR". This appears to be inconsistent with §§ 900.1006(b) and 900.1004(c)(2) which authorize the Secretary to make this determination and provide that the Secretary and the tribal organization may mutually agree on the type of award document. We think the regulations should authorize the Secretary and the tribal contractor to mutually agree on the appropriate award document.

Section 900.1006(f) describes requirements applicable to letter contracts. Letter contracts are subject to internal agency approval. The provision does not explain what type of internal agency approval process is contemplated. The process should be described more specifically in order to be in compliance with the Act.

Bonds and Warranties (900.1007) (3211) -- This provision requires that fixed-price contracts include a provision which requires the bonding company to complete the contract if the contractor "defaults." We are not clear as to what "default" means in this context. The statutory and regulatory requirements with respect to retrocession and reassumption apply to construction contracts. We assume that it is the intent of this section that the bonding company be required to complete the project in the event retrocession or reassumption occurs in accordance with the provisions of subpart K. This section should provide that the bonding company complete the contract in the event of retrocession or reassumption.

***Recommended Revision:***

We recommend that the second sentence of 900.1007(a) be revised to read:

**Bonding agreements for fixed-price contracts shall also contain a provision which requires the bonding company or its designee to complete the contract if the contract is retroceded or reassumed pursuant to Subpart K of these regulations.**

Davis-Bacon Wage and Labor Standards (900.1009) (3211) -- This section correctly exempts employees of tribes and public non-profit tribal instrumentalities employed by contractors or subcontractors from the Davis-Bacon Act in accordance with the legal position of the Department of Labor, stated in a 1972 opinion of the Solicitor of Labor. However, § 900.608 contains language inconsistent with this rule as to subcontractors and, as noted above, § 900.608 should be revised to be consistent with § 900.1008.

Inspection and Acceptance (900.1010) (3211) -- This provision states that the Secretary "shall have access to work in preparation or progress at any time" for inspection purposes. The granting of access for inspection is unnecessary and could interfere with completion of the work. The provision should provide that the Secretary must provide notice of any inspection and that the inspection will be conducted at a reasonable time. The last sentence of the provision requires the Secretary to "generally" complete the final inspection within thirty days. This language is ambiguous -- it can be interpreted to mean that there are exceptions to the rule that the Secretary must conduct a final inspection or that a final inspection need not be made under certain circumstances. This language was not included in earlier drafts of Subpart J and should be deleted.

***Recommended Revision:***
We recommend revising 900.1010(a) as follows:

**(a) The Secretary shall have reasonable access to work in preparation or progress at regular intervals as agreed to by the Contractor, and the contractor and its subcontractors shall provide access for inspection. Final payment for work performed will not be made until the Secretary conducts a final inspection and determines that the work complies with all material contract requirements. The Secretary shall complete the final inspection within thirty calendar days of receipt of written notice from the contractor of completion of the work.**

Architect/Engineer (A/E) Services (900.1011) -- The procedure for selecting qualified architects and engineers (A/E) contained in § 900.1011 is "designed to meet the requirements of the Brooks Act as codified in the FAR." We strongly object to the general application of the FARs and the burdensome Brooks Act requirements to tribal A/E contracts. Brooks Act compliance can be extremely difficult for tribes in remote, rural locations and can result in the selection of architects from geographic regions far from the construction site and disastrously inappropriate designs. Certain contracts for A/E services are not construction contracts and should, therefore, be exempt from FAR coverage in accordance with § 105(a) of the Self-Determination Act, as amended. In particular, we recommend the deletion of § 900.1011(b) requiring a tribal evaluation board for the selection of A/E services. If such a board is required, then we recommend the following revisions.

*Recommended Revision:*
Insert at the beginning of 900.1011(a)

**Except as provided in subsection 900.1011(e) below,**

**(b) Except as described in subparagraph (e) below, the evaluation of a potential A/E subcontractor shall be undertaken by an evaluation board established by the contractor and composed of members who, collectively, have experience in architecture, engineering, construction or related professions, or administration of programs to be performed in the facility to being designed. Each board will consist of at least 3 members. No firm shall be eligible for award of an A/E services subcontract by the contractor while any of its principals, associates, or employees are participating as members of the evaluation board or participated as members of the evaluation board when the firm was evaluated.**

Revise 900.1011(c) as follows:

**(c) The evaluation board shall:**

**(1) Review current data files on eligible firms and their responses to a public notice concerning the particular project;**

**(2) Evaluate the firms in accordance with (f) below;**

**(3) Conduct formal interviews, obtain additional data, and verify references with the most highly qualified firms regarding concepts and the relative utility of alternative methods of furnishing the required services in the particular project, when the prospective A/E contract is estimated to exceed the small purchases limitation. Architect-engineer fees shall not be considered in these discussions; and**

**(4) Prepare a final selection list recommending the firm and alternates, if any, considered to be the most highly qualified to perform the required services. The list shall include a description of the considerations upon which the recommendations are based.**

Section 900.1011(d) states that the final selection of A/E sub-contractors must be submitted to the Secretary for concurrence before negotiations can begin. No time-frame is provided for the Secretary to make a determination. A 20-day deadline for concurrence is reasonable and should be included in the regulations.

***Recommended Revision:***

Insert the following sentence at the end of the second sentence in § 900.1011(d):

**The Secretary shall concur in or reject the proposed final selection within 20 days of receipt of notification of that selection.**

Paragraph (e) should be revised to read:

**(e) If a tribe authorizing contracting of the construction project maintains an in-house A/E department the contractor may use A/E services provided by that department without participating in the procedure set out in §900.1011(a)-(d) above.**

Payments (900.1012) (3212) -- The last sentence in this provision gives the Secretary the authority to withhold indefinitely payments scheduled under the terms of a contract if the Secretary determines that the contractor has failed to comply with the material terms and conditions of the contract.

Section 105(b) of the Self-Determination Act, as amended, is cited as the source of this authority. Section 105(b) only gives the Secretary the authority to impose such conditions on payments as the Secretary deems necessary to carry out the purposes of the Act. Section 110(b) of the Act does not permit the Secretary to revise or amend the terms of a contract without the consent of the tribal contractor and the Secretary is not permitted to terminate a contract without complying with the reassumption provisions of section 109 of the Act, including the right to a hearing. Action to withhold payment may be a de facto termination. This sentence is inconsistent with the Act and should be deleted. Funds should not be withheld unless the contractor has been provided with an appeal and a hearing.

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***Recommended Revision:***

Revise the final sentence to read as follows:

**(e) If the contractor fails to comply with the material terms and conditions of its contract as determined by the Secretary, the Secretary may, if necessary, exercise his/her rights under 900.1106 hereof.**

Savings on Construction Projects (900.1013) (3212)-- This section requires that savings in a cost-reimbursement contract be returned to the Secretary, unless the savings result from a value engineering proposal initiated by the tribe or tribal organization and accepted by the Secretary, in which case the savings would remain obligated to the contractor for project enhancements or additional benefits under the contract. This language is not consistent with § 106(a)(3) of the Self-Determination Act, as amended, which provides, in part, that "savings in operation under a Self-Determination contract shall be utilized to provide additional services or benefits under the contract ... " We do not see how a regulatory provision in flat contradiction to the statute can be justified.

***Recommended Revision:***

This section's title should be revised to read: "§ 900.1013 Savings and Profits on Construction Contracts." The section should be revised to read:

**The negotiated price of a fixed-price contract may include a reasonable profit. Funds obligated to a cost-reimbursement construction contract remaining after the completion of the project (including reimbursement of the contractor for all authorized expenditures) shall remain obligated to the contractor to provide additional services or benefits under the contract.**

See discussion below on fixed-price contracts under § 900.1014.

Waivers (900.1016) (3212) -- Relying on the authority in section 105(a) of the Self-Determination Act, as amended, this provision describes a procedure for a contractor to request waivers of specific statutes or regulations. The procedure does not include a time-limit within which the Secretary must issue a response to a waiver request and it does not provide a contractor the right to appeal a denial of a waiver request. We recommend that this section provide for a 30-day deadline for action on a waiver request.

The sentence stating that the declination criteria do not apply to waiver requests should be deleted. A request to waive a contracting law or regulation should be granted unless it can be declined based on the declination criteria. As to regulatory provisions we think evaluation of waiver requests against declination criteria is clearly required by the Act. With respect to statutory provisions of contracting laws the Secretary should exercise his waiver authority consistent with the goals of the Act and approve waivers unless such approval would cause services to Indians to be unsatisfactory, adequate protection of trust resources would not be assured, or the project cannot be properly completed or maintained. The Act requires that the provisions of contracting laws and regulations be evaluated against the specific criteria. In other words the Secretary should be required to justify a statutory provision in light of the declination criteria, not simply to cite it. If the FAR matrix continues to include clauses entirely inappropriate for the Indian self-determination programs, then at least there should be a meaningful administrative appeal to review whether such clauses are necessary and supportable under the declination criteria.

## SUBPART K -- RETROCESSION, RESCISSION AND REASSUMPTION

Retrocession (900.1101) (3240) -- The proposed regulations include DOI draft language making a tribe's request to retrocede a portion of a contracted program subject to the discretion of the Secretary. This restriction is inconsistent with section 105(e) of the Act, which provides simply that a retrocession shall become effective within one year of a request. The statute contains no requirement that a tribe must retrocede all activities performed under a contract or lose its retrocession rights. When a tribal organization administers a program for several tribes, retrocession of the portion of the contract serving one tribe (or tribes other than all of the supporting tribes) should involve consultation with the tribal organization.

***Recommended Revision:***

The last sentence of 900.1101(a) should be revised to read:

**(a) Prior to the expiration date of the contract, a tribe has a right to return responsibility for the operation of a contract to the Secretary. A tribe, after consultation with the tribal organization in the case of a contract administered by a tribal organization, may elect to retrocede a portion of the operation of a contract.**

Procedure in the event of breach of contract by a tribal organization (900.1103) (3241) -- The proposed regulations make retrocession procedures applicable when a tribal contractor (other than the tribe) "breaches" a contract and provides for tribal action in the event the tribal organization fails to comply with a contract. There is no statutory basis for this special procedure.

Tribal retrocession rights exist whether or not a tribal organization has breached the contract and are entirely discretionary with the tribe. The Secretary's interest in such cases is limited to the circumstances in which he or she can cancel the contract and reassume the contracted program. These extra-statutory procedures should be eliminated from the regulations. Cancellation of a contract in case of the violation of its terms is provided for in the re-assumption provisions under § 109 of the Act and conditioned upon the circumstances specified therein.

***Recommended Revision:***

We recommend that 900.1103 be deleted in its entirety.

Effect of Retrocession (900.1105) (3241) -- The proposed regulations provide that the Secretary shall "endeavor to provide" the same level of funding and quality of services that were provided prior to retrocession of the program to the Secretary by the tribal organization. Tribal representatives have argued that the Secretary provide no less than the same level of funds and quality of services as were provided prior to retrocession of the contract. In effect, the proposed regulations require no more than a "best efforts" commitment. Since the agencies now have one year to prepare for operating a retroceded program they should be able to provide at least the level of services and funding as had been available when notice of retrocession was received, subject to no adjustment other than those authorized by section 106(b) of the Act.

***Recommended Revision:***

We recommend deletion of the words "endeavor to" in this section.

Non-emergency Reassumption (900.1106) (3242) -- The proposed regulations create an additional criterion (which has no statutory basis) for reassuming a contracted program. Under section 109 of the Act, the Secretary may reassume a contracted program on a finding of either the violation of the rights or endangerment of the health, safety or welfare of any person, or gross negligence or mismanagement in the handling or use of funds provided to the tribal organization under the contract. The proposed regulations add a third non-statutory criterion - "endangerment of trust resources." While in some circumstances such endangerment could constitute a violation of rights or endangerment of welfare, we are concerned that this additional criterion could provide a basis for the Interior to reassume a program because it disagrees with a tribe's view of how to best manage tribal resources. If this new reassumption criterion needs to be added, it should be done by Congress, not by an agency attempt to amend the statute.

***Recommended Revision:***
We recommend deletion of this phrase.

Emergency Reassumption (900.1106(b)) (3242) -- While the proposed regulations retain language clearly setting out the standard which the Secretary must use when deciding to reassume a contract (contractor's performance poses an "immediate threat of imminent harm"), they omit a sentence included in the September 1990 draft requiring that "such a determination shall be based on an evaluation of the contractor's performance against the requirements of its contract". This proposed language grew out of a successful challenge by the Tohono O'odham Nation to an attempt by the IHS to reassume a component of its IHS contract for failure of the Tribe to perform activities beyond its contract obligations. The agencies should only be able to reassume a contract based on the failure of a contractor to perform activities which it has a contractual obligation to perform. Deficiencies in the contract language, itself, should not be addressed through the reassumption procedures. The deleted language should be restored and made applicable to emergency reassumptions and, as well, to non-emergency reassumptions under 900.1106.

## SUBPART L - DISCRETIONARY GRANTS

Applicability (900.1201) (3242) -- Like prior draft regulations, the proposed discretionary grant subpart incorporates various provisions of the regulations and makes them applicable to discretionary grants. However, unlike the earlier drafts, the provisions requiring the Secretaries to consult with tribes before amending the regulations are not applicable to Subpart L. The waiver provisions, however, are applicable to these grants. Like the September 1990 draft, the proposed regulations provide that contract support funds are not applicable to discretionary grants. Furthermore, the proposed regulations state that "all applicable direct and indirect costs will be included in the award amount." We take this to mean that an Indian tribe (usually a smaller tribe) with a high indirect cost rate will have less direct program dollars to utilize than a tribe with a lower indirect cost rate since such costs are "included" in or taken off the top of the award. We see no justification in this discriminatory provision.

***Recommended Revision:***
We recommend the deletion of subparagraph 900.1201(c)(6).

Facilities Construction (900.1207) (3244) -- Facilities constructed under construction grants may not "in any manner" be leased back to the Secretary. This provision reflects an existing IHS policy and obviously creates serious obstacles to the use of such grant funds to address the need for health facilities in the Indian Country. Congress has expressly authorized such leasing arrangements in the Indian Health Care Improvement Act.

***Recommended Revision:***
We recommend the removal of this restriction by deleting subparagraph (d).

## SUBPART M - SECRETARIAL REPORTS AND CONSULTATION REQUIREMENTS

Secretary's Annual Report to Congress (900.1301) (3245) -- The proposed regulations delete language from this section in the September 1990 Joint Draft which required that the Secretary consult with tribes concerning the formulation of the annual budget. However, such consultation is provided for in § 900.103(b)(6). For clarity this obligation should be cross-referenced in § 900.1301. The proposed regulations also delete language which required the Secretary to develop within a year of implementation of the regulations, with full participation of tribes, a budget planning process which afforded tribes maximum participation in the development of annual budget estimates for the BIA and the IHS. These modifications are distressing in the degree that they de-emphasize tribal participation in budget planning.

The proposed regulations should be revised to make clear that the report to Congress should include an estimate of the "contract support" needs for the succeeding fiscal year since that information will assist the Congress in providing sufficient funds in such succeeding year to comply with section 106(a)(2) of the Act.

***Recommended Revision:***
Section 900.1301(b) should be revised to specifically reference "direct contract support" as well as indirect costs.

We further recommend that a new paragraph (g) be added which provides that the Secretary's report to Congress include:

**An estimate of the total funds required in the next fiscal year to fully fund the contract support cost needs of contractors in accordance with § 106(a)(2) of the Act.**

Secretary's Annual Report to Indian Tribes (900.1302) (3245) -- In view of agency reliance on the "processes actually utilized" for allocate resources, the Secretary's annual report to Indian tribes should include an explanation of these processes.

***Recommended Revision:***

We recommend that a new paragraph (e) be added at the end of the section.

**(e) The report shall detail the processes actually utilized by the Secretary to allocate resources among program activities.**

**SUBPART N - PROGRAM STANDARDS, DEPARTMENT OF HEALTH AND HUMAN SERVICES**

Assurance on program standards (900.1401-1402) (3245, 3246) -- This Subpart has undergone revisions which raise a number of questions concerning the degree of flexibility afforded tribal contractors in designing their own program standards. Like earlier regulation drafts, the current proposed regulations acknowledge that program standards, data collection and reporting and quality assurance "are necessary, interrelated, and essential parts of a satisfactory health program." The Secretary is required under the proposed regulations to establish joint tribal/Federal participation processes to "review and advise on departmental program standards, quality assurance programs, and Core Data Set Requirements (CDSR)."

The proposed regulations recognize, however, that responsibility for the day-to-day operation of a contracted program rests with the contracting tribe or tribal organization. The proposed regulations retain the sentence which states that: "Nothing in this Subpart is intended to create any additional declination or reassumption criteria." Nevertheless, 900.1402 requires that all applications and contracts contain an assurance of compliance with any "applicable" JCAHO or HCFA standard.

Earlier drafts regarding applicable standards allowed more latitude in the development of such standards. The 1989 "Yellow Draft" stated the following:

> "Although for purposes of uniformity and consistency, it is the preference of these Departments [BIA and IHS] that self-determination contracts include the same standards and data requirements [as the BIA and IHS], it is recognized that Congress intended that tribal contractors have the option of presenting and negotiating alternative standards and data requirements.

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> "Standards must be well-known, commonly used and accepted, and measure qualitative and quantitative values. JCAHO and HCFA standards, where applicable, are considered acceptable standards without further specification in the contract proposal. Where JCAHO and HCFA standards are not applicable, tribal contractors may choose among national, state, professional or department standards, or develop equivalent tribally-accepted standards." [Emphasis added.]

The "Yellow Draft" set out the process a tribe was to follow to establish acceptable standards and data requirements. Having been participants in the discussions resulting in the Yellow Draft, we are well aware that the intention was to permit the use of JCAHO or HCFA standards when a contracted program was in compliance or could comply, but not to bar contracting under the Act if a program was not in compliance with such standards because available resources were insufficient or the tribal contractor chose to propose alternative standards.

Alternative standards were appropriate (1) where the Departmental requirements were considered to be unduly burdensome; (2) where the information was not readily available to the tribal contractor; and (3) where the tribal contractor did not consider the Departmental data requirements essential. The Department would then advise the tribal contractor on the acceptability of the proposed standards and data requirements.

In the September 1990 Joint Draft this section read: "The following assurance must be included in the proposals, contracts and contract modifications: The contract proposal shall include an assurance that the contractor will comply with appropriate national, State, professional, agency or tribal standards. ... [JCAHO or HCFA] accreditation or conditions of participation are applicable." The procedures allowing the establishment of alternate standards had been deleted.

Under the present proposed regulations, the provision on Program Standards, Data and Quality Assurance now reads: "The following assurances must be included in the proposals, contracts, and contract modifications: ... An assurance that the contractor will comply with applicable [JCAHO or HCFA] accreditation standards or conditions of participation." Only where such standards are not applicable do tribal contractors have the option of identifying a national, state, professional, agency or tribal standard which the health program would use. No procedures are set out for contractors to follow to establish their own standards or the basis upon which such standards will be evaluated by the

Department in cases in which a program or facility does not meet JCAHO or HCFA standards.

In the 1989-90 consultations, neither tribal or agency representatives intended to require compliance with JCAHO or HCFA standards for all "638" contractors. The intent was simply to provide that compliance therewith was sufficient without further contract requirements as to the content of a program. If a program to be contracted could not meet such standards, then the tribal contractor could propose and negotiate alternative standards with the agency being entitled to decline to accept the proposed standards if it disagreed with them based on the statutory declination criteria.

Under the proposed regulations, current contracts which do not meet the requirements of this Subpart or which are silent on program standards, program data or quality assurances, must meet the requirements of the program standards, data and quality assurances sections "in the first request for continuation or annual funding made subsequent to the effective date of these regulations." On the face of the proposed regulations it appears that IHS would decline the renewal or extension of such contracts if the standards are not met. Requiring compliance with JCAHO and HCFA standards would be unfair to contractors unable to comply with such standards due to lack of funds and could deprive Indian people of medical services. The alternatives set forth in earlier drafts of the "638" regulations should be restored. We have been assured by IHS staff that the new language in sections 1401-1402 is not intended to require compliance with the standards. If so, appropriate changes need to be made to clarify the intention.

Assurance on data Collection and Reporting (900.1402(b)) (3246) -- Like earlier drafts, the proposed regulations require that a contract proposal to IHS must include an assurance that the contractor will maintain a data collection and reporting system which is "compatible" with the Core Data Set Requirements (CDSR) applicable to the program. Under the proposed regulations, a contractor is not required to use the IHS data collection and reporting system, provided that the system used "provides for the transmission of accurate and complete data ... as otherwise required to meet the CDSR of the applicable IHS information systems," as well as requirements of the Computer Security Act of 1987, if the data collection and reporting system is automated. However, IHS plans no special financial assistance to tribal contractors to meet such requirements. An IHS representative has explained this by stating that Congress lays additional reporting requirements on IHS without providing additional resources. Of course, compliance with such additional requirements on an IHS-wide basis may be much easier finance than in the case of a small program.

It appears that there is no incentive for tribal contractors to issue their own reporting requirements. It is our impression that the more the requirements differ from the CDSR, the more likely it will be that agency staff will find it difficult to match those requirements to agency reporting requirements. The easier it is for agency officials to understand the operations of a contracted program, the easier it will be for that agency to identify program needs, and perhaps remedy them.

Changes to the CDSR are to be published as a general notice in the Federal Register. Regulatory changes to reporting requirements under the CDSR imposed on tribal contractors are an exception to (or a violation of) the statutory requirement prohibiting unilateral changes to self-determination contracts by the Secretary.

Like earlier drafts the proposed regulations acknowledge that the cost of meeting the requirements of this subpart are an allowable cost under the contract. Unlike earlier drafts, however, the regulation drafters have deleted language which provided that if the costs for providing the data required by the CDSR was not included in the program covered by a contract, the Secretary was to "endeavor" to provide such funding to the contractor for these costs. The September 1990 Joint Draft had required that the Secretary reimburse contractors for any reasonable costs necessary to meet CDSR above and beyond those costs included in the contract award. This provision should be restored.

***Recommended Revision:***
At the end of 900.1402(b) the following sentence should be added:

**(4) The Secretary shall reimburse the contractor for any reasonable costs to comply with the CDSR beyond those costs which were included in the program prior to the effective date of these regulations.**

The proposed regulations require that the Secretary provide technical assistance to enable contractors to convert their data into the formats required by the IHS information systems. Earlier drafts had included provision for funding to assist the contractor in developing and implementing acceptable quality assurance programs. We recommend the restoration of this commitment which, while subject to the availability of appropriations, nevertheless reflects a good faith intent on the part of the Secretary to address data collection needs.

Tribal representatives supported language which would have made the incorporation of program standards, data collection, reporting and quality assurances subject to negotiation based on local conditions, availability of funding, staffing and training capacity, data processing capabilities, and the availability of technical assistance. Tribal representatives pointed out that all too often the Department imposes greater reporting requirements without providing additional funds or assistance to aid tribes in integrating the additional requirements into their performance routine. This language should be included in § 900.1403.

***Recommended Revision:***
Section 900.1402(b) should be revised to include a sentence which reads:

**(5) The Secretary shall provide technical and financial assistance to Contractors to enable them to comply with the requirements of this section.**

Fair and Uniform Provision of Services (900.1404) (3246) -- We recommend that the complex and confusing language in the proposed regulations be deleted and the statutory requirement be stated in the simple form found in the present BIA regulations.

***Recommended Revision:***
Replace 900.1404 with the following:

**The contractor agrees that any services or assistance to Indians under the contract shall be provided in a fair and uniform manner.**

See discussion below under § 900.1502.

## SUBPART O - DEPARTMENT OF THE INTERIOR PROGRAM STANDARDS

Under the new proposed regulations, except when a contractor can justify a "variance" from existing Federal standards, "contractors shall adhere to all program standards to which the Federal agency is subject, ... including statutes, regulations, orders, policies, agency manuals, guidelines, industry standards and personnel qualifications," to the extent that such standards are referenced or set out in the contract or these regulations "and have actually been observed by the government in its operation of the particular program." How this last subjective criterion is to be determined and by whom is not specified. While the requirement is limited to requirements "referenced or set out" in the contract or regulations, this provision is an invitation to the Department to impose boilerplate requirements to which the agency, itself, is subject.

This language apparently seeks to reverse the "burden of proof" in a declination appeal which is placed on the government elsewhere in the regulations. This provision is also a dramatic reversal of existing regulatory language which makes clear that inconsistencies between a contract proposal and BIA policies and guidelines is not a basis for declination. See 25 C.F.R. § 271.15(d). The proposed regulations limit, rather than enhance, the ability of tribes to re-design a contracted program. This is the exact opposite of what Congress intended. The Senate Select Committee on Indian Affairs in the Report accompanying the 1988 Amendments said:

> "[T]he Committee intends for the amendment to prevent the Bureau of Indian Affairs from requiring tribal contractors to adhere to standards or procedures contained in the Bureau of Indian Affairs Manual. The Committee amendment also prevents the Bureau of Indian Affairs from requiring tribal contractors to utilize financial, procurement, travel, and personnel systems or procedures utilized by the Federal Government for the internal operation of Federal agencies.
>
> "It should be clear from the intent of the Indian Self-Determination Act that the administrative procedures and methods used by Federal agencies for their own internal operations should not be imposed upon tribal contractors." S. Rep. No. 274, 20 (1987).

Rather than recognizing the individuality of Indian tribes and drafting regulations which would allow for more, not less, flexibility, the proposed regulations impose uniformity as the rule. A tribe will only be allowed the opportunity to do something different when it can carry the burden of justifying an exception. While such regulations would make the federal job of determining contractor compliance easier, they thwart Congress' goal of allowing Indian contractors to focus on better serving the needs of the Indian tribes and their members. The proposed regulations do not, in the words of the Congress, "move beyond the tendency to develop 'generic' policies applicable to all tribes regardless of needs or conditions." They impose uniformity and rigid adherence to Federal guidelines and standards -- without regard to whether they meet Indian needs.

The proposed regulations state that when a statute, regulation, order, policy, manual, guideline or industry standard or other requirement which is identified prior to contracting is subsequently revised, the contractor must comply with the revised standards unless the contractor "satisfies" the Federal contracting officer that compliance with the new standard would "materially increase its cost" under the contract and supplemental funding is not available. This criterion is entirely subjective and therefore subject to inconsistent application by contracting officers. Revised orders, policies, manuals, guidelines or industry standards should not be automatically applicable without negotiation since the Act prohibits unilateral contract modification by Interior.

Under the proposed regulations, a contractor may propose an alternative means of meeting the performance level provided that the Secretary finds that the alternative standards, (1) promote the purposes of the Act, (2) meet the trust responsibility to Indians, (3) assure the performance of functions or activities at a level "comparable" to that of the government. Requests for variance may be submitted at the time of contracting, or as a modification request. The regulations should be revised to make clear that program standards are subject to negotiation and that the Department may not impose its own program guidelines as a condition for contracting, but may only act to decline a proposal (subject to appeal and hearing) based on the statutory declination criteria and must carry the burden of proof that a standard on which the agency insists is essential to avoid declination under such criteria.

### Recommended Revision:

We recommend deleting section 1501(a) through (d) and inserting the following in lieu thereof:

### §900.1501 - GENERAL PROGRAM REQUIREMENTS

**(a) Purpose and Scope**

**(1) This subpart addresses contract program requirements. The Secretary's requirements may be used in evaluating proposals to determine whether to approve or decline a contract.**

**(2) Where the Secretary determines that the contract proposal as submitted will not produce minimum satisfactory results in accord with the statutory declination criteria, negotiations as well as technical assistance will be used to avoid declination.**

**(3) General program requirements for construction contracts are in Subpart J of this part; special program requirements for particular Department of the Interior construction programs may appear in this subpart.**

**(b) Identification of Program Requirement**

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**(1) The contract proposal shall identify the program requirements to be used in carrying out the program to be contracted. Such program requirements shall comply with applicable statutes.**

**Additional requirements utilized in the Secretary's direct operation of his program may be found in Departmental Manuals (DM) and shall be provided to tribes upon request. The requirements will not be unilaterally imposed on the tribes.**

**(2) Program requirements selected or developed for a contract involving trust resources may not be less than the Secretary adheres to at the time the proposal is submitted. A program requirement selected may be higher than that maintained by the Secretary, but such choice must be identified in the contract.**

**(c) Program Requirement**

**The Secretary shall not require a contractor to adhere to any program requirements other than those identified in the contract.**

**(d) Coordination of Programs**

**The Secretary shall coordinate the program(s) or portion(s) thereof carried out by him, with those carried out by a tribal contractor(s). A contract proposal shall include an assurance that the Indian tribe or tribal organization will coordinate its programs with the program(s) or portion(s) carried out by the Secretary or by other tribes or tribal organizations. The proposal shall describe the methods for coordination with other governments and organizations in carrying out the contract, if appropriate.**

**To provide for the orderly transition in the delivery of programs to individual Indians and Indian tribes, a period of transition or co-management may be provided to meet the requirements of the Indian tribe and the Secretary's responsibility. This period of transition must be executed within available funds by a cooperative agreement between the Indian tribe and the Secretary.**

Conflicts of Interest (900.1501(e)) (3247) -- The September, 1990 Joint Draft merely required that a contractor which operates a trust resource program give an assurance that conflicts of interest or apparent conflicts of interest would be avoided. Now, under the proposed regulation, all tribal contractors and their employees are, for all intents and purposes, treated as Federal employees for conflicts purposes without regard to the subject matter of the contract. The proposed regulations impose upon tribal contractors requirements which are more stringent than requirements imposed upon procurement contractors.

Interior's insistence on policing intra-tribal matters is one more example of the federal attempt to use the opportunity to issue new regulations to narrow, rather than to enhance, tribal autonomy. It reminds us of BIA's attempt to transfer an agency superintendent on conflict-of-interest grounds when a tribe elected his brother as tribal chairman. The Bureau insisted that there must be a "conflict" although there was no statutory or regulatory basis for applying federal conflict of interest rules to that case. Indeed, under federal conflict of interest regulations, there was no conflict. The BIA lost in court. See Oglala Sioux Tribe v. Andrus, 603 F.2d 707, fn. 13 (1979). We recommend a return to the compromise language which was carefully negotiated between federal and tribal representatives and incorporated in the 1990 Joint Draft.

***Recommended Revision:***
We recommend that this section be deleted and a new paragraph (e) be substituted in its place, as follows:

**(e) Avoiding Conflicts of Interest**

**A contract proposal to operate trust resource programs shall include an assurance that conflicts of interest, or appearances of conflict of interest will be avoided among the contractor, contractor's employees, tribal governing body, the clients being served, and individual trust or restricted property owners.**

Fair and Uniform Provision of Services (900.1502) (3248) -- The Interior Department appears to have used a provision similar to the IHS standard set out in Subpart N concerning the Fair and Uniform Provision of Services. In existing Interior regulations, the Fair and Uniform Services clause is one sentence long. "The contractor agrees that any services or assistance provided to Indians under the contract shall be provided in a fair and uniform manner." 41 C.F.R. § 14H-70.617. Under the proposed regulations, services must be provided under a contract "consistent with applicable priorities, policies, and regulations and shall make no discriminatory distinction among beneficiaries." A lengthy, but non-exhaustive list of "discriminatory distinctions" is then set out. This more complex and restrictive language has been adapted by Interior from present IHS regulations (48 C.F.R. § PHS 352.280-4(a) Clause No. 37).

This change was developed in response to a congressional directive to streamline "638" requirements and increase tribal flexibility. It certainly gives a new meaning to "streamline" and "flexibility".

***Recommended Revision:***
We recommend elimination of § 1502 and retention of the current language set forth at 41 C.F.R. § 14H-70.617, as follows:

> **The contractor agrees that any services or assistance provided to Indians under the contract shall be provided in a fair and uniform manner.**

## SUBPART P -- REGULATION ADMINISTRATION

Participation and Presentation (900.1603) (3249) -- Under the proposed regulations, except for changes to OMB Circulars, regulations and other "codified directives" referenced in these regulations, the Secretary of the Interior and the Secretary of DHHS are to consult with, and solicit the participation of, Indian tribes and tribal organizations in developing amendments to these regulations at least 60 days prior to presenting the proposed amendment to the Congress. We view changes to OMB Circulars and other referenced regulations to be just as significant, if not more so, as regulation amendments. Such changes will normally be made to circulars and regulations by agencies having no experience in or authority over Indian matters with no consideration as to whether such modifications benefit or harm Indian tribes. Under the September 1990 Joint Draft, tribal contractors had the option of whether to be bound by changes to OMB Circulars once its contract was negotiated. Further protections were afforded tribes by having such changes reviewed by the Secretary and tribes in consultation. If it were found that the change was neither detrimental to tribes nor inconsistent with the Act, the Secretary would then amend the regulations to reflect the change.

We recommend replacing the language of the proposed regulations with the compromise language included in the 1990 Joint Draft.

Waivers (900.1605) (3249) -- The revised language authorizes the Secretary to grant a waiver of "any Federal contracting law or regulation" as well as "a provision of these regulations" for good cause shown on the ground that the waiver is in the best interests of persons to be served under the contract. When deciding whether to grant a waiver request, the Secretary shall consider (1) whether there are unusual circumstances which make the law or regulation inappropriate for the contract; or (2) whether the waiver will alleviate "substantial hardship."

Neither agency, however, permits a contractor to appeal the denial of a waiver request, and waivers, when contained in a contract proposal, "may be considered separately from the proposal at the discretion of the Secretary. The declination criteria ... do not apply to such requests for waivers." This means that the Secretary may decline a waiver request, even if granting it would not result in unsatisfactory services, inadequate protection of trust resources or prevent the completion of the services to be contracted.

Under the proposed regulations, the initial decision on a waiver request is final for the Department and, unlike current regulations of the Interior Department, contain no time-frame by which a decision must be made. Tribes will, however, be notified of the reasons for the denial although no appeal rights are provided them. In our opinion, a regulatory waiver request included in a contract proposal may legally be declined only on the basis of one of the three statutory declination criteria (which under the third declination criterion would permit a refusal to decline if the regulation proposed to be waived is required by statutory law). Consequently, the proposed regulatory clause on waivers is contrary to law and should be revised to provide that waiver requests will be approved unless declined under the declination criteria.

***Recommended Revision:***

Delete the second and third sentences in 900.1605(a) and insert the following:

**For a specific contract or contracts, the Secretary shall, when requested by a tribe or tribal organization in a contract proposal or a contract modification proposal, waive a federal contracting law or regulation provided, however, that such a request may be declined in the manner set forth in 900.207 and any such declination shall be subject to appeal as provided in Subpart H. In considering whether to decline a waiver request of a contracting law on the ground stated in 900.207(b)(3) the Secretary shall approve the request in the absence of a specific finding that the application of the law in question to the contract or contracts is consistent with the government-to-government relationship between the**

**United States and the Indian tribes and with the findings and policies set forth in sections 2 and 3 of the Act.**

Sincerely,

HOBBS, STRAUS, DEAN & WALKER

S. Bobo Dean

Attachments

ATTACHMENT A

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April 15, 1994

MEMORANDUM

TO: Tribal Clients

FROM: Hobbs, Straus, Dean & Walker

S Bobo Dean

RE: The Irrelevance Of Buckley v. Valeo, et al. and the Appointments Clause

The discussion of contractibility in the proposed regulations at 59 Fed. Reg. 3168 suggests that the scope of contractibility is to be defined by reference to the Buckley v. Valeo, 424 U.S. 1 (1975), line of cases, so that "significant authority pursuant to the laws of the United States" may constitutionally be exercised only by Officers of the United States appointed pursuant to the Appointments Clause of the Constitution. Reference is made to "a number of cases after Buckley" in which, it is said, the Supreme Court has upheld delegations only where the President "retains sufficient control."

Curiously, no effort is made to explain how these Supreme Court decisions bear upon any realistic hypothetical contracts that might be entered into under Public Law 93-638. In fact, these decisions have no conceivable bearing on contractibility. Every one of the cited decisions is concerned only with the separation and/or delegation of powers among the Executive, Legislative and Judicial branches. The issue in all of these cases was the extent to which Executive-type functions could be exercised by persons outside the Executive Branch when the person performing those functions is doing so by virtue of an appointment by some authority (e.g., Congress) outside the Executive Branch.

A good example of this is found in a recent decision by The U.S. District Court for Oregon in Confederated Tribes of Siletz Indians of Oregon v. United States, Civ. No. 92-1621-BU (D. Or. Dec. 22, 1993). Siletz involved § 2719(a) of IGRA which prohibits

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gaming on off-reservation lands acquired in trust by DOI after October 17, 1988, and § 2719(b)(1)(A) which made the prohibition inapplicable under certain conditions. These conditions were a determination by the Secretary, after consultation with relevant interests, including State and local officials, that a gaming establishment on such land "would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination. . . ." (emphasis added). Id. at 8 (citing 25 U.S.C. § 2719(a)).

The District Court said the underlined language in the above quote violated the Appointments Clause "when it granted a state governor veto power over a discretionary determination made by an agency of the Executive Branch legislatively charged with making that determination." Id. at 24. In reaching this decision the court observed that the Appointments Clause "specifically addresses separation of powers between Congress and the Executive Branch," and that its "core concern is to ensure that executive power remains independent." Id. at 18. These principles were violated when "Congress, in effect unconstitutionally empowered the Governor to act as if she were an officer of the United States appropriately appointed by Congress to 'serve' pursuant to federal statute and to exercise significant authority over federal government actions through a congressional grant of power." Id. at 17.

Clearly, it is not the exercise of an executive function by an outsider that runs afoul of the Appointments Clause; it is the fact that the outsider was an agent of the Congress, not the Executive. If Congress had enacted a statute that simply authorized the Secretary to grant exceptions to the prohibition in § 2719(a) in accordance with such rules as he might promulgate, and the Secretary promulgated a rule identical to the language in § 2719(b)(1)(A) giving the Governor a veto over the Secretary's determination, this would not implicate the Appointments Clause because there would be no impingement on the separation of powers principle.

The use of the Buckley line of authority in the proposed regulations to limit the scope of contractibility flies in the face of long established and accepted authority and federal practice. The Atomic Energy Commission and its successors, including the Department of Energy, have from the beginning used management and operating contractors to run all phases, including construction, of its national laboratories and other major facilities and programs. Similarly, it is a well-known fact that the mainstream of the space program is managed and operated by contractors.

In a 1969 article, we find an appendix setting forth an AEC "management contract document" of the kind then in use. The contract recites that the Government engages the contractor to manage, operate, and maintain the Government-owned facilities

> "in accordance with such directions and instructions not inconsistent with this contract which the Commission may deem necessary and give to the Contractor from time to time. In the absence of applicable directions and instructions, the Contractor will use its best judgment, skill, and care...."

Hiestand & Florsheim, The AEC Management Contract Concept, 29 Fed. Bar J. 67, 103 (1969).

The responsibilities of the contractor explicitly include procurement "by subcontract [of] the construction of new facilities or the alteration or repair of Government-owned facilities." Id at 103.

Although the Government has the full power to supervise and control all aspects of the contractor's work, the principle underlying such contracts is that the contractor is expected to operate in a largely independent way so that the Government will have the full benefit of its managerial and technical expertise.

In 1982, the Supreme Court, in United States v. New Mexico, 455 U.S. 720 (1982) considered whether the intimacy of the contractual relationship between such contractors and the Government protected the contractors from State use taxes. The Court held unanimously that the contractors were required to pay the tax (although they would be reimbursed by the Government). Justice Blackmun wrote the Court's decision, noting that "[w]hile subject to the general direction of the Government, the contractors are vested with substantial autonomy in their operations and procurement practices." Id. at 723.

Nothing in the Buckley line of cases has any relevance to the question of what functions the executive branch may contract out. Where an agency of the Executive Branch enters into a contract, the contractor performs its function for, and in effect as an extension of, the Executive Branch, and is subject to the control of the Executive Branch to the extent provided in the contract.

Nothing in the cited decisions bars an agency of the Executive Branch from contracting with a private party to manage the development or conduct of major Federal programs; from retaining private law firms to litigate on behalf of the United States; or operates as a bar to any P.L. 93-638 contract that has a realistic subject matter. We are not aware of any instance (other than the present proposed regulations) in which the Buckley line of decisions has been cited as a basis for limiting the scope of executive agency contracting.

Indeed, it is significant that in 1992, the Office of Management and Budget issued a Policy Letter (57 Fed. Reg. 45103) on inherently governmental functions to provide guidance to the departments and agencies as to which functions are inherently governmental, i.e., must be performed only by government personnel; and which are contractible, but so closely support Government personnel in their performance of inherently Governmental functions that their terms and performance of the contracts require closer scrutiny and monitoring. It is particularly significant, that this Policy letter makes no reference to the Buckley line of cases or to the Appointments Clause.

The OMB Policy letter clearly does not involve bright-line distinctions, but calls for review of the totality of the circumstances in each case to assess such factors as the role of the contractor in making decisions and the locus of the ultimate decision-making. The erroneous application of the Buckley principles produces arbitrary bright-line distinctions as to whether a particular function "involves the exercise of significant authority pursuant to the laws of the United States." The answer to this question can always be "yes" if the agency does not want to contract.

In short, Buckley and its prodigy are totally irrelevant and inapplicable to the question of contractibility under P.L. 93-638. Whether or not a particular function is contractible should be decided case-by-case on the basis of the totality of the circumstances, including particularly whether the P.L. 93-638 contract can be drafted in a manner that will adequately protect the Government's interest (such as its "trust responsibility" to the Indians). The reliance by the agencies on the irrelevant Buckley line of cases suggests that at least some of the officials of these agencies are seeking by any means, including grossly misleading interpretations of the law, to protect the Indian service bureaucracy against the federal policy of Indian self-determination.

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ATTACHMENT B

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April 14, 1994

**MEMORANDUM**

TO: Tribal Clients

FROM: Hobbs, Straus, Dean & Walker

RE: Indian Preference Provisions - Proposed Joint P.L. 638 Regulations

Section 7(b)(1) of the Indian Self-Determination Act ("P.L. 638") provides that any contract or grant, or sub-contract or sub-grant, under that Act or any other federal act for the benefit of Indians must require a preference for training and employment of Indians to the greatest extent feasible. Section 7(b)(2) requires that preference in the award of such sub-contracts and sub-grants be given to Indian organizations and Indian-owned economic enterprises. The proposed joint regulations reflect a disagreement between the Department of the Interior ("DOI") and the Department of Health & Human Services ("HHS") as to whether the Indian preference must be without regard to tribal affiliation. The disagreement stems from the DOI solicitor's 1986 and 1992 opinions that the Section 7(b)(1) and 7(b)(2) preferences, respectively, must be implemented without regard to tribal affiliation.

## I. HISTORY OF THE "TRIBAL AFFILIATION" LIMITATION:

1964: Title VII of the Civil Rights Act of 1964 prohibits discriminatory employment practices, but exempts employers on or near an Indian reservation with respect to a publicly announced practice for giving employment preference to Indians living on or near a reservation. 42 U.S.C. Sec. 2004(e).

1975 (January): P.L. 638 was enacted with Indian preference provisions in Section 7(b).

1975 (November): DOI promulgated 25 CFR 271-277 implementing Section 7(b)'s Indian preference requirements, but added a provision that "a tribal governing body may develop its own Indian preference requirements to the extent that such requirements are not inconsistent with ...[Section 7(b)]."

1976: On June 25, 1976, the Department of Labor ("DOL") published proposed amendments, which were adopted later in 1976, to 41 CFR adding a new Section 60-1.5(6) which for the first time introduced an Indian exemption from the Equal Employment Opportunity Contract Compliance regulations. In the discussion of the proposed amendment at 41 Fed. Reg. 26229, it was stated that the proposed amendment would parallel Section 703(i) of the 1964 Civil Rights Act, and that neither the Indian preference obligations of P.L. 93-638 contractors, nor the Indian preference provisions of 25 CFR Parts 271-277, would be altered. However, language was added without explanation or comment that the preference "shall not ... discriminate among Indians on the basis of religion, sex, or tribal affiliation ... "

1984 (April): DOI promulgated 48 CFR 1404.70 and 1452.204-70 and 72 which require an Indian preference clause in certain DOI contracts, but not in P.L. 638 contracts, which clause includes the "tribal affiliation" language. In addition, however, 48 CFR 1404.7005 authorizes supplementation of the clause by specific tribal preference requirements. The preamble to the Federal Regulations publication of the proposed rule at 44 Fed. Reg. 62511-62512 (1979) states that no such tribal preference requirement, including one based on tribal affiliation may be inconsistent with the intent of P.L. 638 or hinder the government's right to award or administer contracts.

1988 (May 16): The EEOC issued a Policy Statement signed by its chairman, Clarence Thomas, on Indian Preference Under Title VII of the Civil Rights Act (8 BNA Labor Rel. Rep. (Fair Employment Practices Manual) 405:6647, at 6653-54. One aspect considered was that of "Tribal Affiliation." The Statement referred to Section 7(b) of P.L. 638 and to the regulations in 48 CFR "issued by the Department of Interior governing the implementation of Section 7(b)." It also referred to the regulations issued by the Office of Federal Contract Compliance of the DOL at 41 CFR Section 60-1.586 which prohibited preferences that discriminated on the basis of tribal affiliation. The EEOC stated that "although Title 7 is silent in this regard, the Commission considers the prohibition expressed in these regulations to best serve the purposes intended by Section 703(i)" of the Civil Rights Act. In EEOC's view, Congress intended in enacting Section 703(i) to encourage the extension of employment opportunities to Indians generally without allowing discrimination among Indians of different tribes.

The Statement notes that there may be de facto discrimination in favor of members of a particular tribe who live on or near the particular reservation on which an employer affording the preference operates. It notes that under such circumstances the preference may operate to favor members of that tribe without disadvantaging members of other tribes who do not live on or near that reservation. Nevertheless, the bottom line of the Policy Statement is that extension of employment preference on the basis of tribal affiliation is in conflict with Section 703(i).

A passage at the end of the Statement "emphasizes that only 'employers' within the meaning of Title VII are affected by the Commission's position, and that since tribes are exempt under Title VII, preferences based on tribal affiliation under the employment practices of an Indian tribe do not violate the Act." Thus, under the EEOC Statement, when a tribe itself is the P.L. 638 contractor, its preferences for its own members would not violate Title VII.

## II. THE BACKGROUND OF THE DOI POSITION

In an opinion, dated July 21, 1986, the Associate Solicitor, Indian Affairs, considered a question raised by Peabody Coal Company as to whether a Navajo ordinance requiring employers to give preference to Navajos, rather than to Indians generally, violated Title VII of the Civil Rights Act. The Associate Solicitor did not really answer this question, since Peabody had also put the question to the Equal Employment Opportunity Commission which had lead responsibility for interpretation of Title VII. The Associate Solicitor deferred to EEOC, which apparently got rid of this question without any published ruling.

The opinion of the Associate Solicitor does, however, make clear his view that it is unlawful to take tribal affiliation into account for purposes of implementing Indian preference. This is accomplished largely by reference to the applicability of the Navajo ordinance to federal contractors. Referring to the Indian preference provisions of P.L. 93-638, the Associate Solicitor dis-

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cussed the DOL regulations at 41 CFR Part 60-1 under the equal opportunity contract compliance program (E.O. 11246) administered by DOL. As discussed above, these regulations required an equal employment opportunity clause in government contracts, but provided an exemption essentially identical to that in Title VII, *supra*, except that it also included a provision barring discrimination among Indians "on the basis of religion, sex, or tribal affiliation." 41 CFR 60-1.5(6). The Associate Solicitor's opinion concluded that "federal contractors would violate this provision if they granted employment preference to Navajos and not to other Indians."

The Associate Solicitor then went on to say that P.L. 93-638 contains Indian preference provisions, and that DOI "implementing provisions at 48 CFR Subpart 1404.70 Sections 1452.204-71, (sic) 1452.204.72 require the insertion of an Indian preference clause in *certain* Interior Department contracts (emphasis added)."[1] The supposedly required clause is quoted and includes the "regardless of ... tribal affiliation" language. The Associate Solicitor then recognizes the fact that 48 CFR 1494.7006 authorizes the federal Indian preferences to be supplemented by specific Indian preference requirements of the tribe on whose reservation the contract is to be performed. To protect his view as to the unlawfulness of tribal affiliation preferences, however, the Associate Solicitor claims that the preambular discussion in the *Federal Register* publication of the final version of the regulations (44 Fed. Reg. 62511-12 (1979) "makes it clear that this provision is not intended to authorize a tribe to impose a ... preference based on tribal affiliation which is inconsistent with the federal regulations."[2]

By letter of October 18, 1992, the Associate Solicitor responded to a request by a Department of Education attorney for DOI'S position on the permissibility of tribal preference requirements with respect to Section 7(b)(2) of P.L. 93-638. She referred to the three provisions in 48 CFR referred to above as "implementing regulations"[3] requiring insertion of an Indian preference clause which is quoted in part, and which includes the "regardless of ... tribal affiliation" language. However, a footnote in her letter states that the so-called implementing regulations under 48 CFR chapter 14 are inapplicable to P.L. 93-638 contracts and solicitations.

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[1] The regulations in 48 CFR can not now be regarded as implementing P.L. 93-638 for the simple reason that the provisions in 48 CFR are explicitly inapplicable to P.L. 93-638 contracts (except in the limited case of construction contracts and, even in that case, the Secretary may waive any FAR provision inappropriate or inconsistent with P.L. 93-638).

[2] We find no such reference to "federal regulations" in the cited *Federal Register* material. The *Federal Register* material does refer to the requirement for consistency with Section 7 (b) of P.L. 638 (even though the regulations in 48 CFR are inapplicable to P.L. 638 contracts).

The footnote then mentions that DOI regulations for P.L. 93-638 contracts are to be found in 25 CFR Section 271.44, 41 CFR Section 14H-70.608, and 41 CFR Sec. 14H-70.610 (none of which, incidentally, includes the "tribal affiliation" language). Weirdly, the next sentence in the footnote observes that the Associate Solicitor's conclusions with respect to preferences based on tribal affiliation "with respect to regulations under 48 CFR Chapter 14 [which, it will be recalled, are inapplicable to P.L. 638 con-tracts] also apply to the regulations under 25 CFR Sec. 271.44 and 41 CFR Part 14H-70" [which, as noted in the first sentence of this paragraph, do apply to P.L. 93-638 contracts but do not contain the "tribal affiliation" language].

Finally, it is stated that it would be inconsistent for preferences based on tribal affiliation to be prohibited for purposes of section 7(b)(1) and permitted for purposes of Section 7(b)(2). The prohibition for purposes of Section 7(b)(1) is said to be based on the July 21, 1986 letter's determination that the DOI regulations in 48 CFR prohibit preferences based on tribal affiliation for purposes of Section 7(b)(1). This is remarkable in view of the footnote statement in the letter that the regulations in 48 CFR do not apply at all to P.L. 638 contracts.

## III. ANALYSIS OF THE SIGNIFICANCE OF TRIBAL AFFILIATION IN THE APPLICATION OF SECTION 7(b)

The Section 703(i) exemption from Title VII of the 1964 Civil Rights Act of publicly announced preference for hiring Indians living on or near a reservation by employers on or near the reservation was the only Indian preference law for more than a decade, (other than 25 U.S.C. § 47 an old law applicable to the Interior Department) and there was no limitation relating to tribal affiliation. When enacted in 1975, P.L. 93-638 included an explicit Indian preference provision, without any hint that preferences based on tribal affiliation would be barred. Indeed, in November of 1975, the Interior Department issued regulations that inter alia implemented Section 7(b) of P.L. 93-638, and added an explicit clause permitting tribes to supplement the Section 7(b) preference with their own Indian preference requirements (25 C.F.R. §§ 271-277). It is difficult to conclude that the principal purpose of such supplementation would be anything other than a tribal preference, within the Indian preference, for members of the particular tribe or persons living on or near the reservation.

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[3] See note 1, *supra*.

Prior to 1976, the Department of Labor regulations implementing the executive orders barring discrimination, and requiring affirmative action, in government contracts and subcontracts did not contain any exemption for Indians. Such an exemption was introduced into the DOL regulations in 1976 with the addition of a new provision, 41 C.F.R. § 60-1.5(6). When notice of this proposed addition was published in the Federal Register the Department of Labor characterized it as being parallel to that in Section 703(1) of the Civil Rights Act, and asserted that neither the Indian preference obligations of P.L. 93-638 contractors, nor the DOI regulations implementing that Public Law would be altered. This suggests that the Labor Department believed that this new provision with respect to Indian preference would not be applicable to P.L. 93-638 contractors. This hypothesis is supported by the fact that some 17 years after the DOL provision on "tribal affiliation" was added, the Interior Department has still not modified its Part 25 regulations implementing P.L. 93-638 to add similar language.

Indeed, the fact that Interior promulgated regulations in 1984 requiring Indian preference clauses, including the "tribal affiliation" language, in contracts other than those under P.L. 93-638, (48 CFR §§ 1404.70 and 72) suggests that Interior itself believed the "tribal affiliation" language would be inconsistent with the intent of P.L. 93-638. On the other hand, the Associate Solicitor used these provisions in the 1992 opinion to "bootstrap" its way to a conclusion that a P.L. 93-638 contractor's preference based on tribal affiliation would be in violation of law. Similarly, the 1992 EEOC Policy Statement "bootstraps" on the basis of these provisions and those in 41 C.F.R. § 60-1.586

The EEOC sees in the "tribal affiliation" prohibitions of 48 CFR §§ 1404.7000, et seq. and 1452.204-71 and 72 provisions that "best serve" the purposes of Section 703(i) of the Civil Rights Act, i.e., extending employment opportunities to Indians generally

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without allowing discrimination among Indians of different tribes. But the real issue is not the surmised purposes of the Civil Rights Act of 1964; it is the purposes of P.L. 93-638, and the answer on this seems much more obvious.

It is probably correct to say that one of the purposes of Section 713(i) of the Civil Rights Act was to help Indians generally without allowing discrimination among Indians of different tribes, but the purpose of P.L. 93-638 was to give greater opportunities for self-government to tribes generally, than existed under prior law.[4] Tribes were to be freed from "the prolonged Federal domination of Indian service programs" which, according to section 2(a) of P.L. 93-638 "has served to retard rather than enhance the progress of Indian people." Indians through their tribal governments were to be given "an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities." Congress further found that "the Indian people will never surrender their desire to control their relationships both among themselves and with non-Indian governments, organizations and persons."

Opportunities for Indians under P.L. 93-638 were derivative from those afforded their tribes. It is clear that Indian self-determination was linked with economic development of tribal lands, which in turn would "create jobs and support businesses on Indian lands." S. Rep. No. 100-274 (1988). It was contemplated that self-determination contracts would result in jobs for members of the contracting tribe, which is, of course, consistent with giving employment preferences for members of that tribe. This would appear to be the case regardless of whether the tribe itself were the contractor or an instrumentality of the tribe, i.e., a "tribal organization," were the vehicle.

In short, the question is whether the allowability of preferences, based on tribal affiliation, should be determined by the Indians themselves through their recognized tribal governments, or whether the agencies, without a single word of support in the language of section 7(b) itself, may decide that question by federal fiat. If the agencies heed the clear purposes and intent of P.L. 93-638, there can be only one answer -- Tribes should decide.

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[4] The Senate Committee on Indian Affairs stated in its report on the legislation enacted in 1988 to amend the original P.L. 638:

> The change in the statement of policy [in Section 102] is intended to ... emphasize the need for the Federal government to recognize the diversity of individual Indian tribes. It is also intended to emphasize the need for the Federal government to consider tribal needs on a tribe-by-tribe basis, and to move beyond the tendency to develop "generic policies applicable to all tribes regardless of needs or conditions ... " S. Rep. No. 100-274 (1988) 16.

Obviously, this interpretation is completely consistent with "Indian preference," and it provides a natural, effortless reading of the statutory provision. The Indian preference is completely intact, although there may be a first preference to members of the contracting tribe. Giving the contracting tribe the right to provide a first preference to its own members can hardly be said to violate Indian preference. At the very most, it might be said, as EEOC suggested in its Policy Statement, to produce some discrimination among Indians of different tribes, but this type of minor discrimination seems to be contemplated by P.L. 93-638, at least when it is mandated by tribal government. The DOI interpretation in the proposed joint regulations may make sense with respect to contracts other than those under P.L. 93-638. With respect to P.L. 93-638 contracts, however, it represents a strained reading that (1) does not rest on any kind of logical or intellectual footing, (2) operates at cross-purposes with the statute, (3) has never been justified by DOI, DOL, or EEOC in any reasoned manner, and (4) is contradicted by DOI's own regulations authorizing tribal preferences.

In short our conclusion that a P.L. 93-638 contractor's preference for members of its own tribe, or residents on or near the reservation, is neither inappropriate nor unlawful so long as a second preference is given to Indians generally. This conclusion is supported by the commentary in Felix S. Cohen's _Handbook of Federal Indian Law_ which asserts at page 672 that federal civil rights statutes "should not extend to tribes discriminating between their members and others" (citing _Fisher v. District Court_, 424 U.S. 382 (1976) and _Slattery v. Arapahoe Tribal Council_, 453 F.2d 278 (10th Cir. 1971).

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ISBN 0-16-046775-6

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